



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

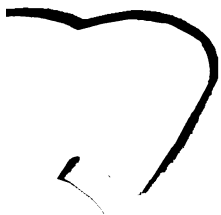
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



DB

AKB

1 J 22

13







A TREATISE
ON THE LAW OF
COMMERCIAL PAPER

CONTAINING

**A full statement of existing American and Foreign Statutes,
together with the text of the Commercial Codes of
Great Britain, France, Germany, and Spain.**

By JOSEPH F. RANDOLPH
Editor of JARMAN ON WILLS and WILLIAMS ON EXECUTORS

SECOND EDITION
IN THREE VOLUMES, WITH APPENDIX
VOL. III.

ST. PAUL, MINN.
WEST PUBLISHING CO.
1899

**LIBRARY OF THE
LELAND STANFORD JR. UNIVERSITY.**

A 42767

Entered, according to the Act of Congress, in the year 1888, by

JOSEPH F. RANDOLPH,

In the Office of the Librarian of Congress, at Washington.

Entered, according to the Act of Congress, in the year 1899, by

JOSEPH F. RANDOLPH,

In the Office of the Librarian of Congress, at Washington.

TABLE OF CONTENTS.

Volume 3.

CHAPTER XXXIX.

PAYMENT.

- I. WHAT IS PAYMENT.
 - II. BY WHOM MADE.
-

I. WHAT IS PAYMENT.

- § 1392. Payment—General Principles.
- 1393. — Application of Bank Deposits.
- 1394. — By Credit to Holder.
- 1395. — To Agent—Partner.
- 1396. — In Securities—Collateral.
- 1397. — By Legacy to Creditor—Debtor Appointed Executor.
- 1398. — In Money—Currency.
- 1399. — “Dollars”—Confederate Currency.
- 1400. — Designated Currency.
- 1401. — United States Legal Tender.
- 1402. — Bank Bills.
- 1403. — Insolvent Banks—Counterfeit Bills.
- 1404. — As a Set-Off.
- 1405. Virginia Coupons.
- 1406. — “Coupon Killers.”
- 1407. Payment in Tokens—Merchandise.
- 1408. — In Work.
- 1409. Part Payment.
- 1410. Discharge on Part Payment.
- 1411. Part Payment by Joint Maker—Indorser—Drawer.
- 1412. — By Acceptor—Maker.
- 1413. Foreign Statutes as to Part Payment.
- 1414. Receipt for Payment.
- 1415. Surrender of Instrument—On Payment.
- 1416. Lost Instruments.
- 1417. Nonnegotiable Instruments—Surrender by Mistake—Fraud.
- 1418. Surrender on Payment before Maturity.
- 1419. Statutes Requiring Surrender.

II. PAYMENT—BY WHOM MADE.

- § 1420. Payment by Acceptor.
 - 1421. — By Accommodation Acceptor.
 - 1422. Reissue by Acceptor.
 - 1423. Payment or Purchase—Question of Intention.
 - 1424. Discount by Drawee.
 - 1425. Payment by Maker.
 - 1426. — By Joint Maker.
 - 1427. — By Drawer.
 - 1429. — By Indorser.
 - 1431. Action by Indorser.
 - 1432. Payment by Indorser after Judgment.
 - 1433. Acceptor Liable to Indorser.
 - 1434. Reissue by Indorser.
 - 1435. Payment by Principal—Surety.
 - 1437. — Supra Protest.
 - 1438. — By Stranger.
 - 1441. Place of Payment—As Agent.
 - 1442. Funds Provided and Lost.
-

CHAPTER XL.**PAYMENT.**

- I. TO WHOM MADE.
 - II. WHEN MADE AND HOW PROVED.
 - III. RECOVERY OF PAYMENT.
 - IV. APPROPRIATION OF PAYMENT.
-

I. PAYMENT—TO WHOM MADE.

- § 1444. Payment To Rightful Holder.
- 1445. — To Designated Payee.
- 1446. — To Joint Payees.
- 1447. — To Persons under Disability.
- 1448. — To Executor.
- 1449. — To Trustee.
- 1450. — To Agent.
- 1451. Implied Agency.
- 1452. Ratification and Revocation of Agency.

TABLE OF CONTENTS.

v

- § 1453. Crossed Checks.
- 1454. Payment to Agent in Notes.
- 1455. — In Bank Notes.
- 1456. — By Check.
- 1457. Default of Subagents.
- 1459. Duty of Collecting Agent.
- 1460. — Presentment and Notice by Agent.
- 1461. — Notice by Agent—Damages.
- 1462. Payment to Payee after Indorsement.
- 1465. — To Pledgor—Pledgee.
- 1466. — To Attaching Creditor.
- 1467. — To Indorsee.
- 1468. — Under Forged Indorsement.

II. PAYMENT—WHEN MADE AND HOW PROVED.

- 1470. Payment before Maturity.
- 1471. — Business Hours.
- 1472. — After Maturity.
- 1473. Burden of Proof.
- 1474. Presumption of Payment.
- 1475. — From Possession by Payee.
- 1476. — From Possession by Acceptor—Indorser.
- 1477. — From Receipt.
- 1479. — Indorsed by Mistake.
- 1480. — From Lapse of Time.
- 1481. Circumstantial Evidence.

III. RECOVERY OF PAYMENT.

- 1483. Recovery for Mistake.
- 1485. — For Fraud—Illegality.
- 1486. — For Forgery.

IV. APPROPRIATION OF PAYMENT.

- 1489. Appropriation by Debtor.
- 1490. — Implied.
- 1491. — Effect.
- 1492. Appropriation by Creditor.
- 1494. — By Law.
- 1495. — To Oldest Items.
- 1496. — To Debts not Due.
- 1497. — To Interest—Not Principal.
- 1498. — To Debts Barred by Limitation.
- 1499. — To Lawful Debts.

- § 1501. — To Individual and Joint Debts.
 - 1502. — To Secured Debts.
 - 1503. — To Debts with Surety.
 - 1505. — To Bills and Other Debts.
 - 1506. Notes Secured by Collateral Mortgage.
 - 1507. Collateral Claimed by General Creditors.
-

CHAPTER XLI.

PAYMENT BY BILL OR NOTE.

- I. PAYMENT BY DEBTOR'S NOTE.
 - II. PAYMENT BY NOTE OF ANOTHER PERSON.
 - III. PAYMENT BY BILL, CHECK, OR ACCEPTANCE.
 - IV. EFFECT UPON PRIOR DEBT OR SECURITY.
-

I. PAYMENT BY DEBTOR'S NOTE.

- § 1509. Note of Debtor.
- 1510. — Of Executor—Agent.
- 1511. Renewal.
- 1512. Agreement for Absolute Payment.
- 1515. Payment by Bill—How Pleaded.
- 1516. Satisfaction—A Question of Intention.
- 1517. Presumption of Payment—Massachusetts Rule.
- 1518. — Rebutted.
- 1519. Effect of Receipt.
- 1520. — Of Surrender of Original Note.
- 1521. — Of Retention of Original Note.
- 1522. — Of Additional Security.
- 1523. — Of Transfer.
- 1525. — Of Loss.
- 1526. Invalid Bills.
- 1527. Unstamped Bill.
- 1528. Usurious Bill.
- 1529. Altered Bill.
- 1530. Forged Bill.
- 1531. Effect of Fraud.
- 1532. Valueless Bill.
- 1533. Note to Third Party.

II. PAYMENT BY NOTE OF OTHER PERSON.

- § 1534. Agreement for Satisfaction.
- 1535. Presumption against Payment.
- 1536. Payment by Note of Partner.
- 1538. — Partnership Renewals.
- 1539. — Dormant and New Partners.
- 1540. — Partnership Notes after Dissolution.
- 1543. Contemporaneous Debt.
- 1545. Previous Debt—Indorsed Notes.
- 1546. — Unindorsed Notes.

III. PAYMENT BY BILL, CHECK, OR ACCEPTANCE.

- 1548. Payment by Bill.
- 1549. Agreement for Satisfaction.
- 1550. Presumption as to Payment—Intention.
- 1552. Payment by Acceptance of Debtor.
- 1553. — By Acceptance of Other Party.
- 1554. — By Check.
- 1555. — A Question of Intention.
- 1556. Checks as Absolute Payment.
- 1557. Payment by Check of Other Party.
- 1558. — By Check Lost—Certified.
- 1559. Check Taken as Cash—Paid to Holder.

IV. EFFECT UPON PRIOR DEBT OR SECURITY.

- 1560. Diligence Necessary against Drawer.
- 1562. — As to Checks.
- 1563. — Against Indorsers.
- 1564. — After Loss—Delay in Suit.
- 1565. — On Transfer without Indorsement.
- 1566. Effect of Receiving Check.
- 1567. Extension by Bill or Note.
- 1568. — Parties Discharged.
- 1569. — Action Suspended.
- 1570. — Other Rights Suspended.
- 1571. Collateral Security—Effect of Renewal.
- 1572. Vendor's Lien on Goods—Stoppage in Transitu.
- 1573. — On Land.
- 1574. — Note by or to Third Person.
- 1575. — Other Security.
- 1576. — Transfer of Note.
- 1577. Mechanics' Liens.

- § 1579. Maritime Liens.
 - 1581. Action for Original Debt.
 - 1582. — Production and Surrender of Note.
 - 1583. — Original Defenses.
 - 1584. — Original Consideration—Illegality.
 - 1585. — Usury in Original Bill.
-

CHAPTER XLII.

ACTION.

- I. TIME FOR BRINGING ACTION.
 - II. PARTIES TO ACTIONS.
-

I. TIME FOR BRINGING ACTION.

- § 1586. Before Maturity—On Day of Maturity.
- 1587. Against Indorser.
- 1588. On Nonacceptance.
- 1589. On Maturity of Installments—Interest.
- 1590. Against Principal Debtor.
- 1591. Statute of Limitations—Fraud.
- 1592. — Bars Set-Off.
- 1593. — Proof by Barred Note—Pleading.
- 1594. — What Law Governs.
- 1595. — American and Foreign Statutes.
- 1596. — Exceptions for Nonsuit, etc.
- 1597. — Duebills and Certificates—Bank Notes—Coupons.
- 1598. — Checks—Sealed Notes.
- 1599. — Attested Notes.
- 1600. — Collateral Securities.
- 1601. — Against State—Decedents' Estates.
- 1602. — Disabilities Excepted.
- 1603. — Joint Obligations—Principal and Surety.
- 1604. — Time Reckoned from Maturity.
- 1606. — Time Reckoned—In What Manner.
- 1607. — Time Reckoned—Demand Notes.
- 1608. — Time Reckoned from Demand.
- 1609. — Time Reckoned from Payment.
- 1610. — Exceptions—Alien Enemy.
- 1611. — Nonresidence.
- 1613. Acknowledgment—New Promise.

- § 1614. — Sufficiency.
- 1615. — Insufficiency.
- 1616. — Verbal—Conditional.
- 1617. — Promise by Agent—Executor—Surety.
- 1618. — Promise by Joint Maker.
- 1619. — To Whom and How Made.
- 1620. — How Proved.
- 1621. Part Payment.
- 1622. — Payment on Collateral—Involuntary.
- 1623. — Payment—How Made.
- 1624. — Payment—How Proved—Indorsement by Debtor.
- 1625. — Indorsement by Holder.
- 1626. — Part Payment by Joint Maker.
- 1628. — Payment by Survivor—Executor.
- 1629. — Payment by Indorser—Surety—Agent.
- 1630. — Payment—To Whom Made.

II. PARTIES TO ACTION.

- 1631. Who may Sue—American Statutes.
- 1632. Action by Payee—Joint Payees.
- 1633. Action by Indorsee.
- 1634. — In What Name.
- 1635. — Sufficiency of Indorsement.
- 1637. — In United States Courts.
- 1638. Action by Pledgee.
- 1639. — By Assignee.
- 1641. — By Drawer.
- 1642. — By Executor—Heir.
- 1643. Action by Indorser.
- 1644. — Indorsement Canceled.
- 1645. — Indorsement Uncanceled.
- 1647. Action by Surety—Joint Debtor.
- 1648. — By Bearer.
- 1649. Action by Owner.
- 1650. — Holder without Title.
- 1651. — "Party in Interest."
- 1652. — Transfer Pendente Lite.
- 1653. — Without Indorsement.
- 1655. — Discount Refused by Payee.
- 1656. — Title without Possession.
- 1657. Action by Agent—Collecting Agent.
- 1659. — By Trustee.
- 1660. — By Government—Party under Disability.
- 1661. — Against Parties Severally.
- 1662. — Against Indorser—Surety—Diligence.

- § 1663. — Against Drawer.
- 1664. — Against Acceptor—Drawee.
- 1665. — Against Joint Debtors.
- 1667. — Against Joint and Several Debtors.
- 1668. — Against Joint Debtor Surviving.
- 1669. — Against Several Debtors—Jointly.
- 1671. Plaintiff and Defendant Identified.
- 1672. Action against Stranger.

CHAPTER XLIII.

ACTION.

- I. FORM OF REMEDY.**
- II. ACTION ON LOST BILLS.**
- III. INTEREST, EXCHANGE, AND DAMAGES.**

I. FORM OF REMEDY.

- § 1673. Forms of Action—Summary Proceedings.
- 1674. Action of "Debt."
- 1675. Collateral—Parties Entitled.
- 1676. — Sale of.
- 1677. — Action of.
- 1678. — Diligence.
- 1679. Trover—Parties to.
- 1680. — Against Agent—Wrongful Taker.
- 1681. — Against Indorsee.
- 1682. — For Lost Bills.
- 1683. — Against Bona Fide Holder.
- 1684. — Damages.
- 1685. Equity—General Principles.
- 1686. — Reform and Cancellation of Bills.
- 1687. — Injunction against Issue or Transfer.
- 1688. — Injunction against Suit.
- 1690. — Bill for Discovery.

II. ACTION ON LOST BILLS.

- 1691. Notice of Loss.
- 1692. Action on Lost Bill—New Promise.
- 1693. Indemnity Required.

- § 1694. — Unnecessary.
- 1695. — Tender of.
- 1696. Action in Equity.
- 1697. — At Law.
- 1699. Statutes—Law and Equity Blended.
- 1700. Loss—How Pleaded.
- 1701. — Evidence—Affidavits.
- 1703. Evidence of Contents.

III. INTEREST, EXCHANGE, AND DAMAGES.

- 1704. Interest—General Principles.
- 1705. — Action for.
- 1706. — Compound.
- 1707. — What Law Governs.
- 1708. — Reckoned from Date.
- 1709. — Reckoned from Maturity.
- 1710. — On Demand Notes.
- 1711. — Until Tender—Bankruptcy.
- 1712. — After Maturity.
- 1713. — After Maturity—Expressed.
- 1714. Exchange and Re-exchange.
- 1716. Notarial Fees.
- 1717. Commissions—Attorney's Fees.
- 1718. Costs of Other Suit.
- 1719. Damages on Protest—What Law Governs.
- 1720. — Statutory.
- 1721. — Recovery by Whom.
- 1722. — Recovery against Whom.
- 1723. — When Recoverable.
- 1724. — On Protest.
- 1725. — Waiver of.
- 1726. — Measure of.
- 1727. — Costs Recoverable.
- 1728. — Against Surety—Guarantor.
- 1729. — Recovery by Indorser.
- 1730. — Partial Dividends.
- 1731. — Recovery by Pledgee.
- 1732. — In Trover—For Negligence.
- 1733. — In What Currency.
- 1734. — Notes Payable in Property.
- 1735. Confederate "Scaling Acts."

CHAPTER XLIV.

DEFENSE—ALTERATION AND FORGERY.

- § 1739. Forgery.
- 1740. — Notice of Discovery.
- 1741. — Foreign Statutes.
- 1742. Alteration—Material.
- 1743. — Immaterial.
- 1744. Change of Party—Addition of Maker.
- 1745. — Addition of Surety.
- 1746. — Addition of Other Signature.
- 1747. — Qualification of Signature.
- 1748. — Erasure of Maker.
- 1749. — Payee's Name.
- 1750. — Negotiable Words.
- 1751. Change of Contract—Promise.
- 1752. — Condition—Consideration.
- 1753. — Indorsement.
- 1754. — Amount.
- 1755. — Medium of Payment.
- 1756. — Interest Clause.
- 1757. — Date.
- 1758. — Time of Payment.
- 1759. — Place of Payment.
- 1760. — Memoranda.
- 1761. — Seal—Attestation.
- 1762. — Number—Stamp.
- 1763. Discharge of Original Debt.
- 1764. Spoliation—By Stranger.
- 1765. Alteration by Mistake—Correction.
- 1766. Consent.
- 1767. — How Proved.
- 1768. — Implied from Blanks.
- 1770. — Implied from Blanks—Negligence.
- 1771. — By Other Party.
- 1773. Stamp Act.
- 1774. Ratification and Walver.
- 1775. — By Acknowledgment—Promise.
- 1776. — What is not.
- 1777. Defense against Bona Fide Holder.
- 1779. Estoppel by Indorsement.
- 1780. — By Acceptance.
- 1781. — By Conduct—Admissions.
- 1782. — By Laches.

- § 1783. Alteration—How Pleaded.
 - 1784. — Burden of Proof.
 - 1786. — Evidence.
-

CHAPTER XLV.

DEFENSE—ILLEGALITY AND FRAUD.

- 1787. Illegal Considerations.
 - 1789. Statutory Prohibitions.
 - 1790. Sunday Laws.
 - 1791. Usury Laws.
 - 1792. — By Corporation—National Banks.
 - 1793. — When Admissible.
 - 1794. — In Transfer.
 - 1795. Usury—Recovery of Payment.
 - 1796. — Recoupment.
 - 1797. — Remedies.
 - 1798. — Pleading and Evidence.
 - 1799. Fraud—False Representation.
 - 1800. — Misrepresentation and Concealment.
 - 1801. — On Creditors.
 - 1802. — Breach of Condition.
 - 1803. — Diversion—Accommodation Paper.
 - 1804. — Diversion to Other Payee.
 - 1805. — Duress.
 - 1806. Fraud in Inception.
 - 1807. — In Transfer.
 - 1808. — On Other Party.
 - 1809. — By Other Party.
 - 1810. — Rescission—Recovery.
 - 1811. — Equitable Relief.
 - 1812. — Waiver.
 - 1813. — Pleading.
 - 1814. — Evidence.
-

CHAPTER XLVI.

SATISFACTION, RELEASE, AND SET-OFF.

- I. SATISFACTION AND DISCHARGE.
 - II. RELEASE AND SET-OFF.
-

I. SATISFACTION AND DISCHARGE.

- § 1815. Change of Contract.
- 1817. Extension—Its Effect.

- § 1818. — Undisclosed Sureties.
- 1819. — Sufficient.
- 1820. — Not Sufficient.
- 1822. — Consideration.
- 1823. Satisfaction—What is.
- 1824. Satisfaction by Payment.
- 1825. — By Bill or Note.
- 1826. — By Other Security.
- 1827. — By Services—Merchandise.
- 1828. Merger in Judgment.
- 1829. — Against Prior Parties.
- 1830. — Against Joint Debtors.
- 1831. Discharge by Execution.
- 1832. Extinguishment by Marriage—Death.
- 1833. Bankruptcy—Discharge.
- 1834. — Composition.

II. RELEASE AND SET-OFF.

- 1835. Release—Consideration—Condition.
- 1836. — Form.
- 1837. — By Implication.
- 1838. — Collateral—Taken or Surrendered.
- 1839. — Agreement not to Sue.
- 1840. — Novation.
- 1841. — Surrender.
- 1842. — Of Execution.
- 1843. — How Extensive.
- 1844. — By Whom.
- 1846. — To Prior Party.
- 1848. — To Joint Debtor.
- 1849. Set-Off—Unliquidated Damages.
- 1850. — Breach of Warranty—Fraud.
- 1851. — Bill or Note.
- 1852. — Liability as Surety—Indorser.
- 1853. — Bank Notes.
- 1854. — Bank Deposits.
- 1855. — Acquired after Suit.
- 1856. — Against Insolvent.
- 1857. — Not Due.
- 1858. — Against Other Party.
- 1859. — Against Agent.
- 1860. — Against Trustee.
- 1861. — Against Administrator.
- 1862. — Against Joint Debtor.
- 1863. — Against Joint Creditor.

- § 1864. — Against Partner—Husband and Wife—State.
 1865. — Collateral—Judgment.
-

CHAPTER XLVII.

EXCLUSION OF DEFENSES.

- I. ESTOPPEL.
 II. BONA FIDE HOLDER.
 III. PAROL EVIDENCE.
-

I. ESTOPPEL.

- § 1866. Estoppel by Contract or Relation of Parties.
 1867. — By Signature, Acceptance, etc.
 1868. — By Representations or Recitals.
 1869. — By Representations—Subsequent—By Others.
 1870. — By Bill or Note.
 1871. — By New Promise.
 1872. — By Conduct.
 1873. — By Negligence.

II. DEFENSE AGAINST BONA FIDE HOLDER.

1874. Defense against Payee.
 1876. Holder with Notice.
 1877. — Without Indorsement.
 1878. — Without Consideration—Pledgee.
 1879. Purchaser after Maturity.
 1881. — Set-Off.
 1882. — Set-Off—Statutes.
 1883. — After Transfer and Notice.
 1884. Collateral—Nonnegotiable Paper.
 1885. Bona Fide Holder.
 1886. — Capacity—Authority.
 1887. — Consideration.
 1888. — Condition.
 1889. — Illegality.
 1890. — Usury.
 1891. — Fraud.
 1892. — Fraud—Between Whom.
 1893. — Fraud in Delivery.
 1894. — Fraud—Diversion of Accommodation Paper.
 1895. — Release—Satisfaction and Set-Off.

III. PAROL EVIDENCE.

- § 1896. Admissibility—General Principles.
 - 1897. — Ambiguity Explained.
 - 1898. — Maturity Extended.
 - 1899. — Satisfaction and Payment.
 - 1900. — Release.
 - 1901. — Varying Liability of Maker.
 - 1902. — Varying Liability of Surety.
 - 1903. — Varying Liability of Indorser.
 - 1904. Contemporary Writings.
-

APPENDIX I.

- I. Negotiable Instruments Law. (Page 2665.)
 - II. California Codes. (Page 2713.)
-

APPENDIX II.**FOREIGN STATUTES.**

- I. British Statutes. (Page 2737.)
 - II. German Exchange Law. (Page 2787.)
 - III. Spanish Code. (Page 2800.)
 - IV. French Code. (Page 2830.)
-

GENERAL INDEX.

(Page 2845.)



COMMERCIAL PAPER

VOLUME 3.

(2017a)

CHAPTER XXXIX.**PAYMENT.****I. WHAT IS PAYMENT.****II. BY WHOM MADE.**

I. WHAT IS PAYMENT.

- § 1392. Payment—General Principles.
- 1393. — Application of Bank Deposits.
- 1394. — By Credit to Holder.
- 1395. — To Agent—Partner.
- 1396. — In Securities—Collateral.
- 1397. — By Legacy to Creditor—Debtor Appointed Executor.
- 1398. — In Money—Currency.
- 1399. — “Dollars”—Confederate Currency.
- 1400. — Designated Currency.
- 1401. — United States Legal Tender.
- 1402. — Bank Bills.
- 1403. — Insolvent Banks—Counterfeit Bills.
- 1404. — As a Set-Off.
- 1405. Virginia Coupons.
- 1406. — “Coupon Killers.”
- 1407. Payment in Tokens—Merchandise.
- 1408. — In Work.
- 1409. Part Payment.
- 1410. Discharge on Part Payment.
- 1411. Part Payment by Joint Maker—Indorser—Drawer.
- 1412. — By Acceptor—Maker.
- 1413. Foreign Statutes as to Part Payment.
- 1414. Receipt for Payment.
- 1415. Surrender of Instrument—On Payment.
- 1416. Lost Instruments.
- 1417. Nonnegotiable Instruments—Surrender by Mistake—Fraud.
- 1418. Surrender on Payment before Maturity.
- 1419. Statutes Requiring Surrender.

Payment—General Principles.

§ 1392. By the law merchant, commercial paper is payable and to be paid in money only. If the bill is drawn in a set of several parts,
(2020)

payment of any one part is payment of the bill.¹ No payment is sufficient, however, unless made and received in good faith;² nor is it a good payment if made in violation of law.³ Whether the facts proved amount to a payment is a question for the jury.⁴ But a mere offer to pay is not a payment.⁵

Application of Bank Deposits.

§ 1393. If the maker of a note has funds, provided for its payment, in the hands of the agent who holds it for collection at its maturity, this will be a payment, and will discharge the maker.⁶ But although an acceptor has sufficient funds at maturity in the bank where the bill is payable, and it is thereupon marked "Paid" and canceled by the bank, such cancellation may be revoked by the bank later in the day, on the acceptor becoming insolvent and the payment being countermanded.⁷ And where a surety has funds in the hands of the bank

¹ Downes v. Church, 13 Pet. 205.

² And this is a question of circumstances. Chit. Bills, 446; Scholey v. Ramsbottom, 2 Camp. 485; Lovell v. Martin, 4 Taunt. 799. Thus, if the holder gives his check to the drawer, to take up the bill on obtaining a renewal of the acceptance, and it is sent by the drawer to the acceptor, and by him misapplied as a payment, and the renewal refused, the acceptor will still remain liable on the bill. Torrance v. Bank, L. R. 5 P. O. 246. So, the fraudulent payment of an individual note by an administrator, out of the trust estate, afterwards recovered from the payee, is not a payment. Fleece v. O'Rear, 83 Ind. 200.

³ E. g. in violation of an injunction. Springfield Marine & Fire Ins. Co. v. Peck, 102 Ill. 265. So, if part payment is made by the maker of a note in contemplation of bankruptcy, and it is afterwards recovered by his assignee, the surety will be liable for the amount, although he has already paid the balance after allowing for such payment, and taken up the note. Watson v. Poague, 42 Iowa, 582.

⁴ Globe Nat. Bank v. Ingalls, 130 Mass. 8.

⁵ Although the funds on deposit for that purpose were afterwards lost by the failure of the bank where they were deposited. Moses v. Trice, 21 Gratt. (Va.) 556.

⁶ Grandy v. Abbott, 92 N. C. 33. And such deposit has been held to be applicable both to notes not yet due, Thomas v. Bank, 99 Iowa, 202, 68 N. W. 780; and to those already matured, Winslow v. Iron Co. (Tenn. Ch. App.) 42 S. W. 688.

⁷ It appearing that, by the usage of the clearing house, the cancellation simply denoted an intention to pay the bill. Warwick v. Rogers, 5 Man. &

holding the note, they are not applicable to its payment without express authority.⁸

There is no presumption of law that funds of the maker in the holder's hands are applicable to payment of a note, and their applicability is a question for the jury.⁹ Thus, if a joint and several demand note made by A. as principal, and B. and C. as sureties, is discounted for A., and the proceeds credited and interest charged to him, the note being intended as a continuing security, the fact of his having at one time sufficient funds in the holder's hands to pay the note will not amount to a payment of it so as to discharge a surety.¹⁰ So, if a note is payable to a banking firm which is dissolved before its maturity, deposits made by the maker with the new firm are not applicable to the note at its maturity without express authority from him.¹¹ And a bank having in hand a general deposit of the maker or acceptor is not bound to apply it to the payment of a bill or note,¹² although previously authorized by the maker to do so.¹³ So, too, if

G. 340. So, the acceptor may remain liable, although the collecting bank has renewed the bill by discounting for the drawer a forged acceptance, and has returned it as canceled, and although the drawer afterwards deposited (but withdrew immediately) a sum sufficient to cover the bill. *Bell v. Buckley*, 11 Exch. 631. In Great Britain, an intentional cancellation, apparent on the bill, discharges it or the party whose name is canceled; but if done by mistake or unintentionally, or without authority, it is inoperative, the burden being on the holder to prove that fact. Bills of Exchange Act, § 63.

⁸ *Lamb v. Morris*, 118 Ind. 179, 20 N. E. 746.

⁹ *McGill v. Ott*, 10 Lea (Tenn.) 147. And if a note is secured by a bill of lading of cotton, and the cotton is afterwards sold, and the proceeds deposited in the bank by the maker, before maturity of the note, but not appropriated by him to it, it will not be a payment. *Randall v. Pettes*, 12 Fla. 518. As to the agency created for maker or drawer by making the note or bill payable at a designated bank, see § 1441, *infra*. Where the bill is payable to the bank, it is under no obligation to apply the drawer's deposit to its payment. *Flournoy v. Bank*, 79 Ga. 814, 2 S. E. 547.

¹⁰ *Pease v. Hirst*, 10 Barn. & C. 122.

¹¹ *Dawson v. Wilson*, 55 Ind. 216.

¹² *Citizens' Bank of Steubenville v. Carson*, 32 Mo. 191. And a surety cannot insist on such application, where the note was, by express agreement or a general course of dealings with the bank, not to be included in the depositor's general account. *National Mahalwe Bank v. Peck*, 127 Mass. 298.

¹³ And subsequent withdrawal of the funds by the maker is a revocation of the authority to the bank, and does not release a surety who would have

the deposit is made after the note becomes due,¹⁴ or by the maker of a collateral mortgage.¹⁵

Payment by Credit Given.

§ 1394. It is not necessary to a good payment that the money should be actually delivered in specie to the holder of the bill. A credit given him by the party ultimately liable is sufficient.¹⁶ And where a draft is charged in a running account, and the credit items are sufficient to cover it and all prior items, they will be so applied in the order of their priority, and will extinguish the draft.¹⁷ So, if a check is deposited in the bank on which it is drawn, and credited to the depositor, in the expectation that the drawer will make his account good, it will be a payment as to the holder.¹⁸ But a check presented for deposit with the depositor's pass book, and noted in it, is received *prima facie* for collection, and not as a cash deposit, and is not paid by such entry;¹⁹ especially where the depositor knew that the drawer had no funds in the bank, and the credit was entered without examining the drawer's account.²⁰

been discharged if the funds had been applied. *Second Nat. Bank of Lafayette v. Hill*, 76 Ind. 223.

¹⁴ *People's Bank of Wilkesbarre v. Legrand*, 103 Pa. St. 309; *Voss v. Bank*, 83 Ill. 590. But in a suit against an indorser, his deposit may be set off. *People's Bank of Wilkesbarre v. Legrand*, *supra*. And conversely, in a suit brought to recover a bank deposit, the bank may set off a judgment against the depositor on an overdue note. *Marsh v. Bank*, 34 Barb. (N. Y.) 298.

¹⁵ *Pease v. Warren*, 29 Mich. 9.

¹⁶ *Byles*, Bills, 228; *Chit. Bills*, 452; 2 Daniel, Neg. Inst. 251; 2 Pars. Notes & B. 219; *Atkins v. Owen*, 4 Nev. & M. 123, 2 Adol. & El. 35; *Bell v. Buckley*, 11 Exch. 631. But, not a mere agreement for a credit. *Pedder v. Watt, Peake*, Ad. Cas. 41. And when a bank receives checks on deposit, and credits them, they are, in general, taken by it as an agent for collection only, and not as a purchaser. 2 Daniel, Neg. Inst. 639; 2 Edw. Bills & N. § 749.

¹⁷ *Hammett v. Dudley*, 62 Md. 154.

¹⁸ *City Nat. Bank of Selma v. Burns*, 68 Ala. 267; *American Exch. Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839; *Albers v. Bank*, 85 Mo. 173; *Howard v. Walker*, 92 Tenn. 452, 21 S. W. 897; *Carlithers v. Stuart*, 87 Ind. 424. Although the check was sent to the depositor at 3 p. m., to have the drawer make it good, and, on his failure to do so, it was returned promptly to the bank a few minutes later. *Oddie v. Bank*, 45 N. Y. 735.

¹⁹ *National Gold Bank & Trust Co. v. McDonald*, 51 Cal. 64.

²⁰ *Peterson v. Bank*, 52 Pa. St. 206.

If a note is credited on a larger claim of the maker against the holder, and the balance is paid in cash, it will be a payment of the note.²¹ A set-off is not a payment, however, unless it is expressly agreed upon as such.²² So, an unexecuted agreement to deliver up a note, and have the amount of it credited on a larger claim of the maker against the holder of the note, does not amount to a payment.²³

Credit to Agent—Partner.

§ 1395. If the holder of a bill directs that it be paid to a certain banker, procuring a credit with such banker will amount to a payment of the bill.²⁴ So, if the amount of a note is credited to a bank holding it as agent for collection (according to the custom of dealings between the banks), it will be a payment, although the bank making the note and giving the credit failed on the day it was so credited.²⁵ And if a collecting bank, A., forwards a bill to the acceptor to be remitted to the B. Bank, and credited to the collecting bank, A., and it is so remitted and credited, but the A. Bank fails the day before the money is received and credited by the B. Bank, such credit will amount to a payment discharging the B. Bank from further liability.²⁶

But if a bank acts merely as collecting agent, the owner is preferred, upon its insolvency, to general creditors as to the fund collected.²⁷

²¹ *Wallace v. Rowley*, 91 Ind. 586.

²² *Byles, Bills*, 228; *Callendar v. Howard*, 10 C. B. 290. So, under an agreement for discounts upon "payments," a recoupment of part of the note is regarded as a reduction of the amount due, and not as a payment. *Russell v. Klink*, 53 Mich. 161, 18 N. W. 627.

²³ *Kenniston v. Bartlett*, 46 N. H. 517.

²⁴ *Chit. Bills*, 453; *Eyles v. Ellis*, 4 Bing. 112.

²⁵ *Gillard v. Wise*, 5 Barn. & C. 134, 7 Dowl. & R. 523. In this case, by the dealings between the banks, the maker became the agent of the collecting bank, to receive and credit such payment. So, where the bank which gave the credit was the drawee, and failed next day. *Briggs v. Bank*, 89 N. Y. 182. And such credit by the maker's bank (then in funds) to the collecting bank discharges the maker, and renders the collecting bank liable to the owner, although the bank giving the credit was then insolvent, and made an assignment two days later. *First Nat. Bank of Nashville v. McClung*, 7 Lea (Tenn.) 492.

²⁶ *Charlotte Iron Works v. American Exch. Bank of New York*, 34 Hun (N. Y.) 26.

²⁷ *People v. Bank of Dansville*, 39 Hun (N. Y.) 187. See § 726, *supra*.
(2024)

And merely crediting the amount collected to an intermediate indorser, who held the bill for collection, is not a payment to the owner; ²⁸ especially where the indorsement is "for collection" or for the use "of the indorser," and carries on its face notice of the indorser's ownership. ²⁹

In like manner, a set-off against an individual partner, under an agreement made by him, will be available as a payment on a partnership note. ³⁰ So, too, an agreement between the maker and the payee of a note, with the consent of the maker's partner, to apply a debt of the payee to the maker's firm as a payment on the note. ³¹ So, a credit of the holder's debt to A. on the individual note of his partner, B., which is charged as a payment by A. against B. on the partnership books. ³²

Payment in Securities—Collateral.

§ 1396. A bill may be discharged by annuities received in payment with a special agreement as to sale; ³³ or by stock certificates delivered as collateral, and to be received at the maker's option as a satisfaction after maturity. ³⁴ But the delivery of property, with power to sell and apply the proceeds, is an unliquidated counterclaim, and not a payment. ³⁵ So, it is not a payment to take another note as collateral; ³⁶ or an assignment of goods from the principal maker, with an

²⁸ *Blaine v. Bourne*, 11 R. I. 119.

²⁹ "For collection." *Bank of Metropolis v. First Nat. Bank of Jersey City*, 19 Fed. 301; or "For collection for account of A.," or simply, "For account of A." *Central R. R. v. First Nat. Bank of Lynchburg*, 73 Ga. 383; or, "For my use." *Sigourney v. Lloyd*, 8 Barn. & C. 622, affirmed 5 Bing. 525. As to the effect of restrictive indorsements of this character, see, also, §§ 724-727, *supra*.

³⁰ *Wallace v. Kelsall*, 7 Mees. & W. 264; *Gordon v. Ellis*, 7 Man. & G. 607; 2 C. B. 821.

³¹ *Davis v. Spencer*, 24 N. Y. 386.

³² *Gwathney v. McLane*, 3 McLean, 371, Fed. Cas. No. 5,882.

³³ *Nairn v. Prowse*, 6 Ves. 759.

³⁴ *Brown v. Smith*, 122 Mass. 589.

³⁵ *Hook v. White*, 36 Cal. 299.

³⁶ Although neither collected nor returned. *Marschuetz v. Wright*, 50 Wis. 175, 6 N. W. 511. So, too, collateral given by a surety for his half of a note is not "Payment" to discharge his co-surety, who had already paid half, and taken a receipt stating it to be a full discharge, if the balance was paid by the other surety. *Aldrich v. Blake*, 134 Mass. 582. And the drawer of a bill cannot vary his contract by proof of a contemporary agreement of the

agreement for possession on future notice;³⁷ or a mortgage from one joint maker with an absolute covenant to pay the debt;³⁸ or to take a collateral mortgage from the maker.³⁹ But a collateral bond and mortgage will merge the note.⁴⁰ And if the holder of a bill takes collateral from the drawer, and informs an accommodation acceptor that he has settled with the drawer, and the acceptor need not trouble himself any further, it will amount to a payment of the bill, although the drawer afterwards becomes bankrupt, and the collateral is not paid.⁴¹

If collateral is taken and transferred by the holder, it will satisfy the bill or note irrespective of its value.⁴² And if a note is payable when a certain other note "is collected," it will become due upon the sale of such note.⁴³ But if a judgment is rendered on the collateral, and is transferred to the maker himself on a part payment by him, it will amount to a payment pro tanto, and no more.⁴⁴ But if the collateral is retaken by the maker, and a judgment in replevin (rendered against him in the payee's favor) is paid by him, it will satisfy the note secured.⁴⁵ So, if a note is secured by a collateral trust deed of property sufficient in value, and the property is sold, it will satisfy the note.⁴⁶

payee to pay himself out of the sale of collateral received from the acceptor. *Abrey v. Crux*, L. R. 5 C. P. 37.

³⁷ *Twopenny v. Young*, 3 Barn. & C. 208.

³⁸ *Ansell v. Baker*, 15 Q. B. 20.

³⁹ Although the mortgaged land was afterwards sold, and the buyer assumed payment of the mortgage, and afterwards resold it subject to the mortgage, *Tucker v. Crowley*, 127 Mass. 400; or, although the foreclosure of the mortgage failed for want of a seal, and the mortgage was reformed in equity, *Springfield Five Cents Sav. Bank v. South Congregational Soc.*, Id. 516.

⁴⁰ *Matteson v. Matteson*, 55 Wis. 450, 13 N. W. 463. So, the payment of a judgment in foreclosure of a collateral mortgage is good as against a purchaser of the note with notice of the foreclosure. *Lewis v. Wintrobe*, 76 Ind. 13.

⁴¹ *Black v. Peele*, cited in 1 Doug. 248.

⁴² See § 803, *supra*.

⁴³ For its face and "without recourse," *Loren v. Hillhouse*, 40 Ohio St. 302; or for a less amount, *Walker v. Phillips*, 35 Tex. 784.

⁴⁴ *Burnheimer v. Hart*, 27 Iowa, 19.

⁴⁵ And if the judgment paid exceeds the note secured, the maker paying it may recover the excess. *Miles v. Walther*, 5 Mo. App. 595.

⁴⁶ *Smith v. Clopton*, 48 Miss. 66. Or if the land mortgaged collaterally is
(2026)

An unsatisfied judgment may merge the bill or note, but is not of itself a payment,⁴⁷ and cannot be pleaded as such.⁴⁸

Legacy to Creditor—Debtor Appointed Executor.

§ 1397. A legacy by the acceptor or maker to the holder of a negotiable bill or note is not a satisfaction of it, since it cannot be supposed that the testator knew in whose hands the paper would be at the time of his death.⁴⁹ On the other hand, if the holder appoints his debtor executor of his will, it is *prima facie* a bequest of the debt or an intention to release or discharge it at common law. And this applies to one who is liable on a bill or note to the testator.⁵⁰ But there is no presumption of such an intent where there are no personal assets, and the debts are expressly charged on the testator's real estate;⁵¹ or where the testator has shown a different intention by a letter directing the executor to make certain other payments.⁵² Many of the United States have provided by statute that such appointment shall not be a discharge of debts due from the executor,⁵³ unless so expressed;⁵⁴ and only then if the balance of the estate is sufficient to pay all other debts.⁵⁵

sold in foreclosure. It will be a payment to the extent of the amount of the sale, although it was bought in by the holder in ignorance of a prior incumbrance, which he was afterwards obliged to pay. *Durbin v. Fisk*, 16 Ohio St. 533.

⁴⁷ *Tarleton v. Allhusen*, 2 Adol. & El. 32. So, a judgment by confession, which the maker's property is not sufficient to satisfy. *Norris v. Badger*, 6 Cow. (N. Y.) 449.

⁴⁸ *Claxton v. Swift*, 2 Show. 441, 404.

⁴⁹ Byles, Bills, 229; Chit Bills, 452; *Carr v. Eastabrooke*, 3 Ves. 561.

⁵⁰ Byles, Bills, 227; *Benj. Chalm. Dig. art. 238*; Story, Bills, § 443; *Freakley v. Fox*, 9 Barn. & C. 130, 4 Man. & R. 18; subject to the right of other debts to be first satisfied, *Marvin v. Stone*, 2 Cow. (N. Y.) 781.

⁵¹ *Lowe v. Peskett*, 16 C. B. 500.

⁵² *Carey v. Goodinge*, 3 Brown. Ch. 111.

⁵³ ARKANSAS (Sand. & H. Dig. § 107); DELAWARE (Rev. Code, p. 675, c. 89, § 18); INDIANA (Horner's Rev. St. § 2572); KANSAS (2 Gen. St. c.

⁵⁴ ALABAMA (Code, § 1962); NEW JERSEY (2 Gen. St. p. 1426, § 8); RHODE ISLAND (Gen. Laws, c. 214, § 6).

⁵⁵ COLORADO (Mills' Ann. St. § 4658); ILLINOIS (Hurd's Rev. St. c. 148, § 19); NEVADA (Gen. St. §§ 2778, 2779); OREGON (1 Hill's Ann. Laws, §§ 1117, 1118).

Payment in Money—Currency.

§ 1398. Commercial paper must, in general, be paid in money or coin at its standard value.⁵⁶ If it is payable in a given currency, and the value of the currency is changed by law before the paper matures, an amount should be paid equivalent to the value of the currency at the time of drawing the bill.⁵⁷ Some of the United States make special provision by statute for the payment of bank notes in specie.⁵⁸

By foreign statutes a bill of exchange must be paid in the currency in which it is expressly made payable,⁵⁹ and, if payable in a foreign or conventional currency, with the usual exchange.⁶⁰ It may be paid

107, § 66); KENTUCKY (Ky. St. § 3889); MISSOURI (Rev. St. § 99); NEW YORK (2 Rev. St. p. 84, § 13). And this applies to one of several joint obligors, who did not qualify as executor. *Mitchell v. Rice*, 6 J. J. Marsh. (Ky.) 623.

⁵⁶ Chit. Bills, 450; 2 Daniel, Neg. Inst. 271; 2 Pars. Notes & B. 219; Story, Bills, § 419. And see § 92 et seq., *supra*. And if such currency is "dollars," that word will be supplied, if omitted, *Williamson v. Smith*, 1 Cold. (Tenn.) 1; especially if indicated by the dollar mark in the margin, *Petty v. Fleishel*, 31 Tex. 169.

⁵⁷ *Da Costa v. Cole*, Skin. 272. And see 2 Daniel, Neg. Inst. 270; Story, Bills, § 418; Story, Prom. Notes, § 390.

⁵⁸ DELAWARE (Rev. Code, Amend. c. 71, § 6); GEORGIA (Code, § 1963); though expressly payable otherwise, NORTH CAROLINA (Code, § 2492).

⁵⁹ ARGENTINE REPUBLIC (Code Com. art. 861); BELGIUM (Code Nap.); BOLIVIA (Code Com. art. 394); CHILI (Code Com. art. 712); COLOMBIA (Code Com. art. 448); COSTA RICA (Code Com. art. 441); ECUADOR (Code Com., as in "Spain"); FRANCE (Code Com. art. 143); GREECE (Code Nap.); HAYTI (Code Nap.); HOLLAND (Exch. Law, art. 156); HUNGARY (Exch. Law, § 112); ITALY (Code Com. art. 228); MEXICO (Code Com. art. 386); NICARAGUA (Code Com. art. 274); PERU (Code Com. art. 448); PORTUGAL (Code Com. art. 377); SALVADOR (Code Com. art. 447); SAN DOMINGO (Code Nap.); SPAIN (Code Com. art. 494); SWEDEN (Exch. Law, § 38); TURKEY (Code Nap.); URUGUAY (Code Com. art. 878); VENEZUELA (Code Com. art. 58).

⁶⁰ ARGENTINE REPUBLIC (Code Com. art. 861); BOLIVIA (Code Com. art. 394); CHILI (Code Com. art. 712); COLOMBIA (Code Com. art. 448); COSTA RICA (Code Com. art. 441); ECUADOR (Code Com., as in "Spain"); GREAT BRITAIN (Bills of Exchange Act, § 72); HOLLAND (Exch. Law, art. 156); ITALY (Code Com. art. 228); MEXICO (Code Com. art. 386); NICARAGUA (Code Com. art. 274); PERU (Code Com. art. 448); PORTUGAL (Code Com. art. 377); SALVADOR (Code Com. art. 447); SPAIN (Code Com.

in the currency of the place of payment, unless required expressly to be paid in some designated currency.⁶¹

In general, a check is not payment, but tender of a check in payment is sufficient if not objected to as such.⁶² So, the note of a municipal corporation cannot be paid by the city's own notes.⁶³

"Dollars"—Confederate Currency.

§ 1399. Payment presupposes money which is a legal tender, and the phrase, "payable in legal tender money," is without meaning in a note.⁶⁴ Thus, prior to the United States Legal Tender Act, a note for so many "dollars" meant specie.⁶⁵ And it has been held that parol evidence is not admissible to show other money intended.⁶⁶ By statute, in Mississippi, all contracts for money made between May 1, 1862, and May 1, 1865, were *prima facie* payable in Confederate currency,

art. 494); SWEDEN (Exch. Law, § 38); URUGUAY (Code Com. art. 878); VENEZUELA (Code Com. art. 58).

⁶¹ GERMANY (Exch. Law, art. 37); AUSTRIA (Exch. Law, art. 37); SWITZERLAND (Ob. R. 756).

⁶² *Jennings v. Mendenhall*, 7 Ohio St. 237. But see *Ohio Ins. Co. v. Nune-macher*, 10 Ind. 234. And see chapter 41, *infra*.

⁶³ *Louisiana Mut. Ins. Co. v. Batt*, 22 La. Ann. 621.

⁶⁴ *Northwestern Nat. Bank v. Jarvis* (Manitoba Q. B.) 20 Cent. Law J. 260. So, in Georgia, a tender, before the Scaling Act of 1868, must be alleged to be in lawful United States currency. *Bone v. Graves*, 43 Ga. 312.

⁶⁵ *Davis v. Phelps*, 7 T. B. Mon. (Ky.) 632. And fractional silver currency, coined prior to 1853 is a legal tender for two five-dollar bank bills. *People v. Dubois*, 18 Ill. 333. So, *prima facie*, United States currency, *Hightower v. Maull*, 50 Ala. 495; *Miller v. Lacy*, 33 Tex. 351; although it is a renewal in 1865 of a note made in 1863, *McNeel v. Smarr*, 3 S. C. 198. So, a note payable "in any current bank paper or state treasury notes of the state of Texas" does not mean Confederate currency, although it was then the only currency, and greatly depreciated. *Woods v. Parker*, 36 Tex. 131.

⁶⁶ E. g. depreciated money, *McMinn v. Owen*, 2 Dall. 173; "commonwealth paper," *Baugh v. Ramsey*, 4 T. B. Mon. (Ky.) 155; bank notes, *Noe v. Hodges*, 3 Humph. (Tenn.) 162; *Pack v. Thomas*, 13 Smedes & M. (Miss.) 11; or Confederate currency, *Austin v. Kinsman*, 13 Rich. Eq. (S. C.) 259; *Leslie v. Langham's Ex'rs*, 40 Ala. 524; *Roane v. Green*, 24 Ark. 210; or to prove a contemporaneous agreement for payment in Confederate currency, at any time, of a note given in July, 1862, for Confederate currency borrowed then, payable on demand, *Terrell v. Walker*, 66 N. C. 244. But see, *contra*, as to Confederate currency, *Thorington v. Smith*, 8 Wall. 1; *Lobdell v. Fowler*,

and only the value of such currency could be recovered.⁶⁷ And in Virginia, where a check given in January, 1863 (which the bank would only pay in such currency), was surrendered by the holder, and a new note taken, it was held to be a new transaction for a loan in Confederate currency.⁶⁸ But in Georgia there is no presumption that a note made in 1863 was to be paid in that currency.⁶⁹ So, lawful money may be recovered on a note made in Louisiana in 1862, payable in "dollars," where a part payment had been already made in lawful money, without any claim that it was payable in Confederate currency.⁷⁰

On the other hand, if Confederate currency is current at the time and place of payment, and is paid and accepted as such in good faith, it is sufficient.⁷¹ But payment in depreciated bank bills, in fraud

33 Tex. 346; *Wilcoxon v. Reynolds*, 46 Ala. 529; *Whitfield v. Riddle*, 52 Ala. 467; *Carmichael v. White*, 11 Helsk. (Tenn.) 262. See, *supra*, § 102. The burden is on the defendant, in such case, to show that Confederate notes were meant. *Neely v. McFadden*, 2 S. C. 169; *Halfacre v. Whaley*, 4 S. C. 173. But Confederate currency need not be received in payment of a judgment rendered in Tennessee in 1870 upon a note bearing date in 1861. *Dillon v. Smith*, 10 Helsk. 595.

⁶⁷ Act of 1867; *Cowan v. McCutchen*, 43 Miss. 207; *Mezeix v. McGraw*, 44 Miss. 100. So, in North Carolina, under act of 1866, as to a bond dated June, 1863, *Palmer v. Love's Ex'rs*, 75 N. C. 163; or a note in November, 1862, *Sowers v. Earnhart*, 64 N. C. 96; or, in 1864, for property purchased at an administrator's sale, after notice that the sale was "for such currency as would be received by creditors of the estate." *Laws v. Rycroft*. *Id.* 100; but not as to a note made in February, 1865, payable in twelve months "in the currency of the country that which will pay taxes," *Johnson v. Miller*, 76 N. C. 439; or a note made in November, 1863, payable in two years, "in the current funds of the country when due," *McKesson v. Jones*, 66 N. C. 258. But a Mississippi statute, making such currency a legal tender for state taxes, does not apply to taxes after reconstruction of the state at the end of the war. *Taylor v. Thomas*, 22 Wall. 479.

⁶⁸ *Dearing v. Rucker*, 18 Grat. 426.

⁶⁹ *Bonner v. Nelson*, 57 Ga. 433.

⁷⁰ *Cook v. Lillo*, 103 U. S. 792.

⁷¹ *Berry v. Bellows*, 30 Ark. 198; *Glenn v. Case*, 25 Ark. 616; *Ritchie v. Sweet*, 32 Tex. 333; *Plegzar v. Twohlg*, 37 Tex. 225; *Mercer v. Wiggins*, 74 N. C. 48; *Sharp v. Harrison*, 10 Helsk. (Tenn.) 573; *Washington v. Burnett*, 4 W. Va. 84; *Jarrett v. Ludington*, 9 W. Va. 333; *Lester v. Manufacturing Co.*, 1 Hun (N. Y.) 288. Especially if the note is surrendered, *Vance v. Cooper*, 22 La. Ann. 508; or the payment entered on the note as a credit, *Freeman v.*

of the owner, to a pledgee who marked the note "Paid" and surrendered it, is no defense against the owner.⁷² So, payment cannot be made in Confederate currency to any one holding such paper in a fiduciary capacity.⁷³ And such currency received under duress will not be a valid payment.⁷⁴ But if a note is made payable in Confed-

Bass, 34 Ga. 355; Green v. Jones, 38 Ga. 347; Luzenberg v. Cleveland, 19 La. Ann. 473. So, whether it is indorsed or not. Norment v. Brown, 79 N. C. 363. So, a payment to a court clerk, in satisfaction of a judgment. Binford v. Bulletin Co., 10 Helsk. (Tenn.) 355. So, the indorser may sue the maker after making payment in Confederate currency. Lyon v. Robertson, 50 Ala. 74. So, payment in depreciated currency, before the war, received as such, is satisfaction to its full nominal value. Hall v. Craige, 65 N. C. 51. But a payment in commonwealth paper has been held to be payment only to the amount of its value in specie. White's Ex'rs v. Guthrie, 1 J. J. Marsh. (Ky.) 503. A tender of Confederate currency may be refused, Spann v. Glass' Ex'rs, 35 Tex. 761; Graves v. Hardesty, 19 La. Ann. 186; notwithstanding a verbal promise to receive such currency in 12 months, in payment of a note previously made in 1862 for a loan in that currency, such promise being without legal consideration, Wooten v. Sherrard, 71 N. C. 374.

⁷² McLemore v. Hawkins, 46 Miss. 715.

⁷³ E. g. to a trustee, Alley v. Rogers, 19 Grat. (Va.) 366; or to the state, as trustee of the school fund, under authority of a subsequent statute (in aid of the war). New Orleans, St. L. & C. R. Co. v. State, 52 Miss. 877. But a trustee receiving payment of a promissory note in Confederate notes, as then received ordinarily by prudent men, will not be liable for so doing. Campbell v. Miller, 38 Ga. 304. So, an administrator cannot receive such currency in payment, Kleberg v. Bonds, 31 Tex. 611; or although a note is especially so payable, Casey v. Turner, 32 Tex. 64. And an agreement of the administrator to receive Confederate currency, if the heirs would receive it (which they did not assent to), is, of course, no payment. Martin v. Singleton, 23 La. Ann. 551. But, if it has been used by the administrator to pay debts of the estate, it will be a good payment. Hendry v. Cline, 29 Ark. 414. So, an executor cannot receive a payment of Confederate currency from himself as a debtor individually. Wilson v. Powell, 75 N. C. 468. So, a sheriff's officer could not receive such currency in April, 1865. Sirrine v. Griffin, 40 Ga. 169. And payment cannot be made to an agent in such currency. Maloney v. Stephens, 11 Helsk. (Tenn.) 738; Griffin v. Walker, 36 Tex. 88; Fretz v. Stover, 22 Wall. 198. But see, contra, as to payment of life insurance premiums to an agent during the war, Sands v. Insurance Co., 50 N. Y. 626; Robinson v. Society, 42 N. Y. 54.

⁷⁴ Anderson v. Lewis, 31 Tex. 675; Harrell v. Barnes, 34 Tex. 413; although the actual value of the currency paid will be credited in such case, Harshaw v. Dobson, 67 N. C. 203. But if the payee loans it to another, and judgment

erate currency, which was then current at the place, and a part payment is subsequently indorsed upon the note, it will only be a satisfaction to the amount named in the indorsement.⁷⁵

Designated Currency.

§ 1400. Whenever commercial paper is payable in foreign currency, the value of such currency must be computed at the usual rates of exchange. But a bank is only obliged to pay a depositor's checks in money, and cannot be required to pay in exchange on any other place.⁷⁶ An instrument payable "in good notes" will be satisfied by tender of a note, with two good indorsers, although the maker is insolvent.⁷⁷ If it is payable in "greenback currency," the tender must be in United States legal tender notes, not in national bank notes.⁷⁸ If "in currency at its specie value," it must be specie.⁷⁹ So, if payable "in current money of Kentucky," or "in current money of the state of Alabama."⁸⁰ But bank notes have been held to be intended by a note payable "in current money of the state of New York or Pennsylvania,"⁸¹ or "in the common currency of Arkansas."⁸² So, it has been held that Confederate currency was intended, or at least sufficient, where the note was payable "in common currency at date of matu-

is recovered on it, it will be a payment pro tanto. *McCartney v. Wade*, 2 Heisk. (Tenn.) 369. And mere fear of being denounced to the rebel authorities is not duress to render the payment void. *Vander Hoven v. Nette*, 32 Tex. 183.

⁷⁵ *Stewart v. Salamon*, 94 U. S. 434. For Scaling Acts of the several Southern States, the reader is referred to a later chapter on "Damages."

⁷⁶ *Hogue v. Edwards*, 9 Ill. App. 148.

⁷⁷ *Polk v. Frash*, 61 Ind. 206.

⁷⁸ *Burton v. Brooks*, 25 Ark. 215.

⁷⁹ *Caldwell v. Craig*, 22 Grat. (Va.) 340; the note being dated in June, 1865. But "undepreciated currency" does not mean "coin." *Blackburn v. Brooks*, 65 N. C. 413.

⁸⁰ Bank notes not being intended. *McChord v. Ford*, 3 T. B. Mon. (Ky.) 166; *Carter v. Penn*, 4 Ala. 140.

⁸¹ The note being, therefore, nonnegotiable, since such bank notes of one state were at a discount in the other, *Lieber v. Goodrich*, 5 Cow. (N. Y.) 186; and such note not being an instrument "payable in money only," *Chambers v. George*, 5 Litt. (Ky.) 335.

⁸² *Dillard v. Evans*, 4 Ark. 175.

city.”⁸⁸ But parol evidence is not admissible to show that “current funds” were commonly understood to mean depreciated bank notes.⁸⁴

United States Legal Tender.

§ 1401. The United States Legal Tender Act has been already considered in an early chapter of this work.⁸⁵ It has been held to be constitutional and binding as such upon creditors,⁸⁶ and applicable to instruments made before its passage and maturing afterwards,⁸⁷ but not to such as were made expressly payable in gold or specie.⁸⁸ And even if a note is payable in gold under an express agreement made after the recording of a collateral mortgage, the agreement will be binding upon a subsequent judgment creditor, and will make the mortgage a lien for the amount in gold;⁸⁹ and, if it is payable and paid in specie, no premium will be allowed on the specie paid.⁹⁰ So, if a note made after the Legal Tender Act is payable “in American gold,” it must be so paid.⁹¹ So, a bond which became due before the act, and was payable “in gold and silver coin, lawful money of the United States”;⁹² or a contract payable “in English golden guineas and other gold and silver coin at the present established weight”;⁹³ or a note payable “in gold and silver coin or its equivalent in currency.”⁹⁴

⁸⁸ *Bell v. Joyce*, 33 Tex. 479; but not if “payable in current funds at the time the note falls due,” and they were not current at that time, *Hilliard v. Moore*, 65 N. C. 540.

⁸⁴ *Marc v. Kupfer*, 34 Ill. 286. For other expressions indicating payment in currency. see § 99, *supra*.

⁸⁵ See § 98, *supra*.

⁸⁶ *Atwood v. Cornwall*, 28 Mich. 336; *Lick v. Faulkner*, 25 Cal. 404; *Davidson v. Peticolas*, 34 Tex. 27; *Maynard v. Newman*, 1 Nev. 271.

⁸⁷ *Hepburn v. Griswold*, 8 Wall. 604; *Bigler v. Waller*, 14 Wall. 297; *Railroad Co. v. Johnson*, 15 Wall. 195.

⁸⁸ *Trebilcock v. Wilson*, 12 Wall. 687; *Bobo v. Goss*, 1 S. C. 262; *Lafitte v. Rivera*, 23 La. Ann. 32. But see, *contra*, *Whetstone v. Colley*, 36 Ill. 328; *Buchegger v. Shultz*, 13 Mich. 420. And for cases on either side of this question, see § 98, *supra*.

⁸⁹ *Poett v. Stearns*, 31 Cal. 78.

⁹⁰ *Tooke v. Bonds*, 29 Tex. 419.

⁹¹ *McGoon v. Shirk*, 54 Ill. 408.

⁹² *Bronson v. Rodes*, 7 Wall. 245.

⁹³ *Butler v. Horwitz*, 7 Wall. 259.

⁹⁴ *Burnett v. Stearns*, 33 Cal. 468; or “in gold or its equivalent in U. S. currency,” *Bridges v. Reynolds*, 40 Tex. 204.

Payment in Bank Bills.

§ 1402. Although bank notes do not differ in most respects in their legal character from other notes, they are often regarded by usage and law as money. Thus, in an action on an original debt, it will be presumed to be paid if bank bills have been received for it.⁹⁵ So, if a stakeholder receives country bank notes, and treats them as money, the amount may be recovered in an action against him as so much money.⁹⁶ And it has been held that notes of a bank may be received by an agent as money in payment of a bill drawn on the bank, although it failed two days afterwards.⁹⁷

In like manner, bank notes are a valid cash tender, unless objection is made to them at the time they are offered;⁹⁸ and if the payee of a

⁹⁵ Chit. Bills, 451; *Hebden v. Hartsink*, 4 Esp. 46; *Southcot v. Watson*, 3 Atk. 226. And bank bills are sufficient as a money consideration for an annuity purchased. *Wright v. Reed*, 3 Term R. 554. So, a certificate of deposit payable in "currency" may be paid in lawful bank notes. *Klauber v. Biggerstaff*, 47 Wis. 551, 3 N. W. 357. In OREGON, no bank is authorized to issue or circulate paper money. Const. art. 11, § 1. In ALABAMA, the circulating of unauthorized paper as money renders the persons circulating such paper, as well as the officers of the corporation issuing it, liable as makers (Code, § 1195). In many of the United States, the banking acts provide against the issue, by banks or others, of notes intended to circulate as money, except as expressly authorized. ARKANSAS (Sand. & H. Dig. § 547; including municipal corporations, Id. § 550); CALIFORNIA (Cr. Code, § 648, the offense being made a felony); COLORADO (Mills' Ann. St. § 532); DELAWARE (Rev. Code, c. 71, § 5); GEORGIA (Code, § 1955); ILLINOIS (Hurd's Rev. St. c. 38, § 54); LOUISIANA (Rev. Laws, § 292); MARYLAND (Pub. Gen. Laws, art. 29, § 4); MASSACHUSETTS (Pub. St. c. 204, § 18); MISSOURI (Rev. St. § 703); NEVADA (Gen. St. § 959); NEW JERSEY (1 Gen. St. p. 132, § 58); NEW YORK (Laws 1892, c. 689, § 87, such notes being void); OHIO (Bates' Ann. St. §§ 3821-8, 3821-75); PENNSYLVANIA (Dig. p. 192, § 100); RHODE ISLAND (Gen. Laws, c. 178, § 35; such notes being void, Id. § 36); SOUTH CAROLINA (2 Rev. St. p. 363, § 297); TENNESSEE (Shannon's Code, § 3217); VERMONT (V. S. § 4989); VIRGINIA (Code, § 3830); WEST VIRGINIA (Code, c. 151, § 14); WISCONSIN (Sanb. & B. Ann. St. § 4540). Sutler's tickets, for use in the army, are not within the meaning of such a statute. *Weston v. Myers*, 33 Ill. 424.

⁹⁶ *Pickard v. Bankes*, 13 East, 20.

⁹⁷ *Union v. Greene*, 1 Hurl. & N. 884.

⁹⁸ *Brown v. Saul*, 4 Esp. 267; *Lockyer v. Jones*, Peake, N. P. 239, note;

draft receives bank notes in payment by his own choice, the draft is paid, although the bank issuing the notes fails a few hours afterwards.⁹⁹ So, if the bank notes are procured for the express purpose, at the request of the payee, and under his agreement to accept them in satisfaction.¹⁰⁰ And although the payee protests against receiving the bank notes (which are then depreciated) without a discount, yet, if he finally takes them without any such agreement, he cannot afterwards bring suit for the amount of the proposed discount.¹⁰¹ So, if current bank notes have been issued without legal authority, but are received by the payee and transferred by him to other persons at par, they are a sufficient payment.¹⁰²

Notes of Insolvent Banks—Counterfeits.

§ 1403. A payment in bank notes, if made in good faith, is binding, although the bank fails the next day,¹⁰³ and although the payment was made by an agent, who exceeded his authority in agreeing to take back the notes if they were returned in a given time, and the bank failed before the agreement became known to the principal.¹⁰⁴

Polglass v. Oliver, 2 Crompt. & J. 15; *Tiley v. Courtier*, Id. 16, note; *Warren v. Mains*, 7 Johns. (N. Y.) 476; *Coxe v. Bank*, 8 N. J. Law, 72; *Cummings v. Putnam*, 19 N. H. 509; *Curtiss v. Greenbanks*, 24 Vt. 536. And this is true, although they may only be worth half their face, and although the bank fail before suit brought. *Lowrey v. Murrell*, 2 Port. (Ala.) 280; especially if the bill or note is expressly payable "in the notes and issues of said bank," *Abbott v. Bank*, 11 Smedes & M. (Miss.) 405. And in such case the tender is good without a continuing profert. *Patton v. Hunt*, 64 N. C. 163. As to notes payable in bank notes, see § 100, supra. But a tender of depreciated bank notes is an offer of compromise, and not a tender of money, *Newberry v. Trowbridge*, 13 Mich. 263; and a tender of Bank of England notes may be refused, *Grigby v. Oakes*, 2 Bos. & P. 526.

⁹⁹ *Vernon v. Boverie*, 2 Show. 296.

¹⁰⁰ *Dakin v. Anderson*, 18 Ind. 52.

¹⁰¹ *Phillips v. Blake*, 1 Metc. (Mass.) 156. So, where he was entitled to specie, but received legal tender notes after objecting to them. *Gilman v. Douglas Co.*, 6 Nev. 27.

¹⁰² *Alexander v. Byers*, 19 Ind. 301.

¹⁰³ *Ware v. Street*, 2 Head (Tenn.) 609. But see, contra, where the bank failed before the close of business hours on the same day, *Owenson v. Morse*, 7 Term R. 64.

¹⁰⁴ *Show v. Perry*, 9 Pick. (Mass.) 539. The notes were to be indorsed as a payment, if not returned, and were not returned within the time agreed.

But if the bank has already failed, its notes are not a payment, although offered and taken as such in good faith, and without knowledge of the failure.¹⁰⁵ And this is so where the failure occurred on the day the payment was made, and only a few hours before;¹⁰⁶ and especially where the bank note was only taken on the assurance that it was good, or would be made so by the person who paid it.¹⁰⁷ It has been held in Pennsylvania, however, that a payment made in good faith in current bank notes is good, although the bank had already failed, and the notes were worthless.¹⁰⁸

The transferor of a bank note, as of a bill or note, warrants that it is genuine.¹⁰⁹ And a counterfeit is not a payment, unless there is an express agreement that the person receiving it shall take the risk.¹¹⁰ And an action may be brought on the original debt, although the bank note was given in good faith.¹¹¹ But a counterfeit bank note need only be taken back if it is returned in a reasonable time;¹¹² and it

¹⁰⁵ *Harley v. Thornton*, 2 Hill (S. C.) 509, note. So, where taken for a precedent debt, *Westfall v. Braley*, 10 Ohio St. 188; *Fogg v. Sawyer*, 9 N. H. 365; on being promptly returned, *Ontario Bank v. Lightbody*, 13 Wend. (N. Y.) 101; *Townsend v. Bank*, 7 Wis. 185. But it is not absolutely essential that the note itself should be returned immediately. *Frontier Bank v. Morse*, 22 Me. 88. And an action may be brought on the original consideration without returning the notes. *Townsend v. Bank*, 7 Wis. 185.

¹⁰⁶ *Houghton v. Adams*, 18 Barb. (N. Y.) 545; especially where the taker was guilty of laches in not returning the notes promptly, *Camidge v. Allenby*, 6 Barn. & C. 373; or where the notes were not produced or tendered for a long time afterwards, nor presented to the bank, *Rogers v. Langford*, 1 Crompt. & M. 637.

¹⁰⁷ *Gilman v. Peck*, 11 Vt. 516.

¹⁰⁸ *Bayard v. Shunk*, 1 Watts & S. 92.

¹⁰⁹ *Edmunds v. Digges*, 1 Grat. (Va.) 359. And see §§ 720, 752, *supra*.

¹¹⁰ *Anderson v. Hawkins*, 10 N. C. 568; *Ramsdale v. Horton*, 3 Pa. St. 330; although at the time believed by both parties to be genuine, *Baker v. Bonesteel*, 2 Hillt. (N. Y.) 397.

¹¹¹ *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; *Mudd v. Reeves*, 2 Har. & J. (Md.) 368.

¹¹² Reasonable time being, in such case, a question of circumstances. *Simms v. Clark*, 11 Ill. 137. Thus, it is not unreasonable if the bank note is laid aside until wanted (two months after), and on discovering the forgery is then returned, *Kenny v. Bank*, 50 Barb. (N. Y.) 112; or if it was circulated and reissued in good faith a second time, and then returned, *Burrill v. Bank*, 51 Barb. (N. Y.) 105.

has the effect of a valid payment, if no notice is given or offer made to return the bill in such time.¹¹³

Bank Notes—As a Set-Off.

§ 1404. In general, the creditor's own note is not available as a tender to him at common law, but amounts only to a set-off.¹¹⁴ And this is equally true of the notes of a bank.¹¹⁵ In some states, however, it is provided by statute that the notes of a bank shall be received by it as money in payment of debts to it.¹¹⁶ The statute of North Carolina requires such notes to be received by the parent or any branch bank, but not in payment of any sealed instrument.¹¹⁷ In Georgia, it makes no difference whether the bank bills offered in payment are payable at the parent or branch bank.¹¹⁸ In Tennessee, such tender is available against the assignee of an insolvent bank as well as against the bank.¹¹⁹ But a subscriber for bank stock can only be credited for depreciated bills of the bank to the amount of the value of the bills.¹²⁰

If a bank holds a note for collection, and receives in payment its own certificate of deposit as cash, it will discharge the note and release

¹¹³ *Thomas v. Todd*, 6 Hill (N. Y.) 340. As to diligence necessary in presenting bank notes, see § 1107, *supra*.

¹¹⁴ *Cary v. Bancroft*, 14 Pick. (Mass.) 315. But see *Mayer v. Nias*, 1 Bing. 311, where an overdue bill of the vendor was tendered to and refused by his agent, but was afterwards taken and handed by him to the vendor, and retained by him. And see *Fair v. M'Iver*, 16 East, 130; *Foley v. Mason*, 6 Md. 37.

¹¹⁵ In Massachusetts, bank notes are not even available as a set-off against the bank. *President, etc., of Hallowell & Augusta Bank v. Howard*, 13 Mass. 235.

¹¹⁶ GEORGIA (Code, § 1963); MAINE (Rev. St. c. 47, § 24); MINNESOTA (Gen. St. § 2510); VERMONT (V. S. § 4033); WISCONSIN (Sanb. & B. Ann. St. § 2024, par. 44).

¹¹⁷ NORTH CAROLINA (Code, § 2287). This act, passed originally in 1869, has been held to be constitutional. *Exchange Bank of Columbia v. Tiddy*, 67 N. C. 169; *Bank of Charlotte v. Hart*, Id. 264.

¹¹⁸ GEORGIA (Code, § 1963).

¹¹⁹ TENNESSEE (Shannon's Code, § 3245).

¹²⁰ *Marr v. Bank*, 4 Lea (Tenn.) 573. But in Illinois the notes of the bank can be used in paying a note for stock, although the bank failed five days afterwards. *Dunlap v. Smith*, 12 Ill. 399.

the maker.¹²¹ But the indorsee of a note payable to a bank need not accept its notes in payment from the maker.¹²² And a bank need not (unless expressly required by statute) receive in payment its own notes which are payable at another place.¹²³ So, where the notes of a state bank are made a legal tender for debts due to the state, they will nevertheless be unavailable for a debt due to it as trustee, and payable in specie.¹²⁴

In some states, bank notes are available as payment or set-off against the bank's assignee in insolvency.¹²⁵ But this is not the case where the bills are greatly depreciated, and were purchased by the defendant after suit begun,¹²⁶ or after the bank became insolvent,¹²⁷ and the original debt had matured.¹²⁸

Virginia Coupons.

§ 1405. The statute of Virginia, by act of 1870, providing for the funding of the public debt of the state, enacted that the new bonds and coupons "should be receivable at and after maturity for all taxes, debts, dues and demands due the state."¹²⁹ This provision has

¹²¹ British & American Mortg. Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319.

¹²² Wynn v. Kelly, 22 La. Ann. 594; Housum v. Rogers, 40 Pa. St. 190; especially if bought by the maker after he has notice of the transfer by the bank, Phillips v. Bank, 18 Pa. St. 394.

¹²³ Bank of the State v. Bank of Cape Fear, 35 N. C. 75.

¹²⁴ Paup v. Drew, 10 How. 218.

¹²⁵ Blount v. Windley, 68 N. C. 1; Union Bank v. Ellicott, 6 Gill & J. (Md.) 363. So, Clarke v. Hawkins, 5 R. I. 219. But see, contra, Dundas v. Bowler, 3 McLean, 397, Fed. Cas. No. 4,141.

¹²⁶ Saunders v. White, 20 Grat. (Va.) 327; Exchange Bank v. Knox, 19 Grat. (Va.) 739.

¹²⁷ Clarke v. Hawkins, 5 R. I. 219; Exchange Bank v. Knox, 19 Grat. (Va.) 739.

¹²⁸ Diven v. Phelps, 34 Barb. (N. Y.) 224.

¹²⁹ Laws 1870, c. 282. And this act is not unconstitutional by reason of its impairing or defeating a subsequent constitutional provision, which dedicates one-fourth of the revenue to the establishment and maintenance of public free schools; and the tender of the coupons is a tender of a receipt for so much money already presumed to be in the treasury. Willis v. Miller, 29 Fed. 238. But a mandamus will not be granted to compel the auditor to refund bonds which have not been presented for that purpose, in accordance with the act. Wise v. Rogers, 24 Grat. 169.

been held to include such tax as a state license to practice as an attorney,¹³⁰ or fines and costs imposed in a criminal proceeding;¹³¹ but not the liability of a state officer for moneys embezzled by him.¹³² In 1872 an attempt was made to repeal this act, but the repealing act was held to be unconstitutional as against holders of bonds already issued.¹³³

It was subsequently held that the exemption of such bonds from taxation was constitutional;¹³⁴ and that deduction of the taxes levied on a particular bond could not be made from a coupon separated from the bond and held by a different owner;¹³⁵ and that the holder was entitled to a mandamus to compel the state treasurer to receive the coupons.¹³⁶ And even where the coupon has been already paid in part by the state, it must be received for the balance remaining unpaid in payment of state taxes.¹³⁷

Virginia "Coupon Killers."

§ 1406. In 1882 and 1884, by a series of enactments, the Virginia legislature attempted to deprive the tax-receivable bonds and coupons of their vital force: First, by imposing on the coupon holder the burden of proving his coupon genuine in a suit to be brought for the purpose; the taxes to be paid meanwhile in other legal tender, and mandamus against the collector to be stayed on his return that he is ready to receive such coupons when legally ascertained to be genuine.¹³⁸

¹³⁰ Although, by statute, made payable in gold or silver coin, United States treasury notes, or national bank notes. *Royall v. Virginia*, 116 U. S. 572, 6 Sup. Ct. 510; *Sands v. Edmunds*, 116 U. S. 587, 6 Sup. Ct. 516.

¹³¹ *Clarke v. Tyler*, 30 Grat. 134.

¹³² *Burgess v. Winston*, 28 Fed. 559.

¹³³ *Antoni v. Wright*, 22 Grat. 833.

¹³⁴ *Williamson v. Massey*, 33 Grat. 237.

¹³⁵ *Hartman v. Greenhow*, 102 U. S. 672.

¹³⁶ *Hartman v. Greenhow*, *supra*; *Williamson v. Massey*, *supra*.

¹³⁷ *Lee v. Harlow*, 75 Va. 22.

¹³⁸ Laws 1881-82, c. 7. This act was amended two years later, so as to require an appeal by the state in all cases, and making such appeal a matter of right. The supplementary acts (January 26, 1886) requiring production in evidence of the bond from which the coupon had been detached, and (January 21, 1886) forbidding expert testimony as to the genuineness of the detached coupons, have both been held valid. *Com. v. Weller*, 82 Va. 721, 1 S. E. 102.

Second, the legislature provided that nothing but gold and silver, United States treasury notes, and national bank notes should be received for taxes; that the collector who received anything else in payment of taxes should be guilty of a misdemeanor; and that the taxpayer who was aggrieved by any steps taken by the collector to enforce a tax which he conceived to be unjust, illegal, or unconstitutional might pay the taxes under protest, and sue within 30 days for a return of the money, to the exclusion of all other remedy by injunction, mandamus, or otherwise, the officer to be protected and indemnified by the state, if acting in good faith.¹³⁹ The United States supreme court has held that the first of these provisions is unconstitutional, and that the tender of tax-receivable coupons for taxes is equivalent to a tender in gold coin, and withdraws the coupon holder from the power and jurisdiction of the state.¹⁴⁰ It has also been held that, after such tender, an action of trespass lies against the officer making the tax levy and taking proceedings to enforce it, notwithstanding the act of the legislature to the contrary;¹⁴¹ that exemplary

¹³⁹ Laws 1881-82, c. 41. This act was amended two years later, by an act requiring the collector to seal up and mark all coupons tendered for taxes, and requiring their production subsequently, in proof of the tender, and prohibiting actions of trespass or trespass on the case against a collector proceeding to levy the tax after such tender of coupons. Laws 1883-84, c. 421.

¹⁴⁰ *Polindexter v. Greenhow*, 114 U. S. 270, 330, 5 Sup. Ct. 903, 962; *Waite, C. J.*, and *Miller, Bradley, and Gray, JJ.*, dissenting, on the ground that the suit is virtually against the state, and the court is therefore without jurisdiction; while *Matthews, J.*, held that the collector, acting under an unconstitutional statute, was not acting officially. And see the opinion of *Matthews, J.* (page 299, 114 U. S., and page 918, 5 Sup. Ct.), distinguishing this case from *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91. So, too, *Chaffin v. Taylor*, 116 U. S. 567, 6 Sup. Ct. 518; *White v. Greenhow*, 114 U. S. 307, 5 Sup. Ct. 923, 962. In *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, and in *Moore v. Greenhow*, 114 U. S. 338, 5 Sup. Ct. 1020, it was held that the act of January 14, 1882, regulating remedy by mandamus in such cases, and requiring prepayment of the tax and subsequent petition and proof of the genuineness of the coupons tendered, was a constitutional modification of the existing remedy, and that a mandamus would not be directed to the state treasurer to receive the coupons for a state tax; *Matthews, J.*, concurring in this case, on the ground that the United States supreme court had no jurisdiction against a state, which was really the defendant in the person of its treasurer.

¹⁴¹ *Chaffin v. Taylor*, 116 U. S. 567, 6 Sup. Ct. 518; *Willis v. Miller*, 29 Fed. 238; and that a distress for the taxes may be restrained by injunction after (2040)

damages may be recovered in such case;¹⁴² that the action is, therefore, within the jurisdiction of the United States circuit court, as involving damages to the amount of \$500;¹⁴³ and that such action will be supported by evidence of the slightest offer as a tender where the state has required its collectors not to receive such coupons for taxes.¹⁴⁴

Payment in Tokens—Merchandise.

§ 1407. In Great Britain the payment of wages in tokens has been prohibited by statute.¹⁴⁵ In some of the United States the payment of wages in store orders is forbidden in certain cases,¹⁴⁶ and in many states the issuing of bills under a certain sum is forbidden.¹⁴⁷

Bills and notes may be made payable in merchandise by agree-

tender of coupons, *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962; but not without any allegation that the complainant is himself a taxpayer as well as coupon holder, *Marye v. Parsons*, 114 U. S. 325, 5 Sup. Ct. 932, 962. And see § 350, *supra*.

¹⁴² *Willis v. Miller*, 29 Fed. 238. And see *Strickler v. Yager*, *Id.* 244.

¹⁴³ *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501. And the jurisdiction of the United States court cannot, therefore, be ousted by an apportionment by the treasurer of a tender of money for county taxes and coupons for state taxes, so as to reduce the amount tendered in coupons for state taxes below \$500. *Green v. Brooks*, 28 Fed. 215. The United States courts cannot, however, take jurisdiction of such action between citizens of Virginia, by virtue of the Civil Rights Act (Rev. St. § 1979). *Carter v. Greenhow*, 114 U. S. 317, 5 Sup. Ct. 928, 962.

¹⁴⁴ *Green v. Brooks*, *supra*.

¹⁴⁵ 1 & 2 Wm. IV. c. 37.

¹⁴⁶ This is so in some counties of NEW JERSEY, and in some kinds of manufacturing and mining business (2 Gen. St. p. 2342, §§ 5, 6, 10). So, in PENNSYLVANIA (Dig. p. 2077, §§ 27, 28), the statute requires that mining and manufacturing wages be paid monthly and in lawful money. But this act has been held to be unconstitutional, as "an attempt to prevent persons who are sui juris from making their own contracts." *Gordon, J.*, in *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354, 4 Cent. Rep. 887.

¹⁴⁷ E. g. under §1. DELAWARE (Rev. Code, p. 588, c. 71, § 5, if issued by individuals or co-partnership, such issue being a misdemeanor); MAINE (Rev. St. c. 47, § 25); MASSACHUSETTS (Pub. St. c. 204, § 20); SOUTH CAROLINA (1 Rev. St. p. 485, § 1403); TENNESSEE (Shannon's Code, § 3218, the issue being a misdemeanor); VERMONT (V. S. § 4991). So, in ALABAMA, under a penalty of bearing interest at the rate of 100 per cent. (Code, § 1755). Or under §5. DELAWARE (Rev. Code, c. 71, § 7, if notes of bank or corpora-

ment.¹⁴⁸ But such a note is more properly a contract for property; e. g. a note payable in United States bonds.¹⁴⁹ If it is payable in money, a tender of merchandise is unavailing.¹⁵⁰ But if payable in merchandise, money may be tendered,¹⁵¹ and, if default is made in delivery of the merchandise called for, the amount becomes due in money.¹⁵² If a note is payable in portable goods, e. g. in salt or cotton, the place for payment is the residence of the payee.¹⁵³ But if the goods are bulky, like lumber or farm produce, the holder must demand them at the maker's yard or farm before he can sue on the note for a money demand.¹⁵⁴ Some cases, however, have held that a prior demand is not necessary.¹⁵⁵

If the maker tenders payment of such a note, he must do it in a tion out of the state); KENTUCKY (St. §§ 1350, 1386); MARYLAND (Pub. Gen. Laws, art. 11, § 23, par. 5); MASSACHUSETTS (Pub. St. c. 204, § 9, other than bank notes); OHIO (Bates' Ann. St. § 3821-15). Or under \$20. ARKANSAS (Sand. & H. Dig. § 553). For the English statute upon this subject, see § 106, *supra*.

¹⁴⁸ E. g. by a contemporaneous memorandum on the note, making it payable in cloth. *Fletcher v. Blodgett*, 16 Vt. 26. So, a note may be paid in wheat, if it is delivered and received as such. *Smith v. Hobleman*, 12 Neb. 502, 11 N. W. 753; or in land, the burden of proving such payment being on the party that avers it, *Kelsey v. McLaughlin*, 10 Neb. 6, 4 N. W. 361. So, if one agrees to do a certain thing on payment of a note, and accepts goods in satisfaction of the note and surrenders the note, it is a payment. *Bacon v. Lamb*, 4 Colo. 578. As to notes payable in merchandise or work, see § 101, *supra*.

¹⁴⁹ *Easton v. Hyde*, 13 Minn. 90 (Gil. 83).

¹⁵⁰ *Lang v. Waters' Adm'r*, 47 Ala. 625.

¹⁵¹ *Ferguson v. Hogan*, 25 Minn. 135.

¹⁵² *Hardeman v. Cowan*, 10 Smedes & M. (Miss.) 486; *Campbell v. Clark*, 1 Hemp. 67, Fed. Cas. No. 2,355a.

¹⁵³ *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377; *Campbell v. Clark*, 1 Hemp. 67, Fed. Cas. No. 2,355a. So, by statute in ILLINOIS (Hurd's Rev. St. c. 135, § 1); IOWA (Code, § 3057).

¹⁵⁴ *Rice v. Churchill*, 2 Denio (N. Y.) 145; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516. So, by statute in ILLINOIS (Hurd's Rev. St. c. 135, § 1); IOWA (Code, § 3057). In *Vance v. Bloomer*, 20 Wend. (N. Y.) 196, it was held that a payment in "ready-made clothing" might be made in parcels, but must be demanded before suit.

¹⁵⁵ *Campbell v. Clark*, 1 Hemp. 67, Fed. Cas. No. 2,355a; *Stewart v. Morrow*, 1 Grant, Cas. (Pa.) 204. But by statute in IOWA, a demand and a refusal, or the allowance of a reasonable time, is necessary. Code, § 3056.

reasonable manner, and on notice before maturity as to the place for delivery.¹⁵⁶ And the tender must be of goods of the quality called for,¹⁵⁷ and at the stipulated time.¹⁵⁸ If the property is perishable, it must be taken care of by the person making the tender until it is delivered, at the cost, however, of the payee.¹⁵⁹

Payment in Work.

§ 1408. Work may also be done and received under an agreement in payment of a bill or note.¹⁶⁰ And such payment and agreement may be proved by parol.¹⁶¹ And it may be shown by parol evidence that work previously done for one partner was by subsequent agreement accepted in satisfaction of a note held by the partnership.¹⁶² If the note is payable in specific work, the payee may demand it, or the maker may tender it or the amount named after maturity.¹⁶³ If payable at his option, before maturity, in work, he must tender the work or be liable for the money.¹⁶⁴ After default it becomes a money demand, and action may be brought on it by an assignee.¹⁶⁵

¹⁵⁶ *Barns v. Graham*, 4 Cow. (N. Y.) 452. Custom may regulate the manner of delivery, e. g. of crude oil to be delivered in barrels furnished by the payee. *Knight v. Petroleum Co.*, 44 Vt. 472.

¹⁵⁷ *Fisk v. Holden*, 17 Tex. 408.

¹⁵⁸ *Pratt v. Graff*, 15 Ind. 1.

¹⁵⁹ *COLORADO* (Mills' Ann. St. § 253); *ILLINOIS* (Hurd's Rev. St. c. 135. § 2); *IOWA* (Code, § 3059). And if it is sold by the maker after tender and refusal, he cannot recover the full contract price. *Harris Mfg. Co. v. Marsh*, 49 Iowa, 11.

¹⁶⁰ *Jennings v. Davis*, 31 Conn. 134; and will discharge both debt and lien securing it, *Martin v. Draher*, 5 Watts (Pa.) 544; and may be proved under a plea of payment, *Hitchcock v. Hassler*, 16 Neb. 467, 20 N. W. 306.

¹⁶¹ If not an original contemporaneous agreement, *Goodrich v. Stanley*, 23 Conn. 79; although even such agreement has been held to be provable by parol evidence, *Jones v. Snow*, 64 Cal. 456, 2 Pac. 28.

¹⁶² *Camp v. Page*, 42 Vt. 739; although the subsequent agreement may fail for want of consideration, *Glimmeson v. Butler*, 12 Ill. App. 399.

¹⁶³ *Johnson v. Seymour*, 19 Ind. 24. But the maker may waive his right to insist on the work as payment on a note by bringing an action for its value. *Sherer v. Collins*, 106 Mass. 417.

¹⁶⁴ *Nipp v. Diskey*, 81 Ind. 214; *Schuessler v. Watson's Adm'r*, 37 Ala. 98.

¹⁶⁵ *Schnier v. Fay*, 12 Kan. 184.

Part Payment.

§ 1409. Tender of part of the amount due on a bill or note is no defense even *pro tanto*.¹⁶⁶ So, if a note matures on default in payment of interest, a subsequent tender of interest will not affect the fact that the principal has become due by default.¹⁶⁷ And a sufficient tender must include statutory damages that are due, and, if made after suit begun, the costs of suit.¹⁶⁸ It is not necessary, however, that it should include, as a separate and additional item, the amount claimed in a subsequent common count for money had and received.¹⁶⁹

The part payment of a bill or note operates, in general, as a discharge *pro tanto*.¹⁷⁰ Thus, a part payment by the acceptor must be taken into account before reckoning the dividend due to the holder out of the proceeds of an attachment.¹⁷¹ So, part payment made by a bankrupt, before or after bankruptcy, must be deducted before proof of claim against his estate.¹⁷² A dividend received is as much a part payment as any other.¹⁷³ In like manner, cash received from the proceeds of a consignment against which a bill is drawn must be credited by the holder before proof made against the estate of a bankrupt drawer.¹⁷⁴ And so, in general, the proceeds of any collateral received by the holder.¹⁷⁵

¹⁶⁶ Byles, Bills, 234; *Cotton v. Godwin*, 7 Mees. & W. 147; *Hesketh v. Fawcett*, 11 Mees. & W. 356; although the debtor may be entitled to a set-off for the residue, *Searles v. Sadgrave*, 5 El. & Bl. 639.

¹⁶⁷ *Stephens v. Association*, 76 Ind. 109.

¹⁶⁸ *Goodwin v. Cremer*, 18 Q. B. 757; *Smith v. Anders*, 21 Ala. 782.

¹⁶⁹ *Sawyer v. Baker*, 20 N. H. 525.

¹⁷⁰ *Benj. Chalm. Dig. art. 233*; *Miller v. Montgomery*, 31 Ill. 350; and may be proved under a plea of payment, *Lord v. Ferrand*, 13 Law J. Exch. 111.

¹⁷¹ *Cowperthwaite v. Sheffield*, 1 Sandf. (N. Y.) 416.

¹⁷² *In re Weeks*, 13 N. B. R. 263, Fed. Cas. No. 17,349.

¹⁷³ *Lincoln v. Bassett*, 23 Pick. (Mass.) 154. And after proof in bankruptcy with undue allowance for collateral (which afterwards became unavailable), and a discharge granted on such proof, the dividend must be deducted before a corrected proof can be made. *Ex parte Worrall*, 1 Cox, Ch. 309.

¹⁷⁴ *Ex parte Harris*, 2 Low. 568, Fed. Cas. No. 6,109.

¹⁷⁵ If the collateral has been levied on and bought in, in an irregular manner, it is enough to credit the actual value of the property. *Duden v. Waltzfelder*, 16 Hun (N. Y.) 337.

Discharge on Part Payment.

§ 1410. Even after the principal amount of a note has been paid, an action may be maintained on a second note given for interest accrued before such payment;¹⁷⁶ or on an agreement to pay such interest, made at the time the principal was paid.¹⁷⁷

But payment of part of the amount due is not a sufficient consideration for a discharge of the entire amount,¹⁷⁸ and will not bar a recovery of the balance,¹⁷⁹ although it has been received in satisfaction of the whole, and the note has been surrendered.¹⁸⁰ So, one of several joint makers will not be discharged by payment of his proportionate share of the entire amount.¹⁸¹ In like manner, part payment of the amount due is not a sufficient consideration for an agreement on the holder's part to extend the time of payment.¹⁸²

The rule that part payment is not sufficient consideration for a complete discharge is confined to payment in cash, and does not apply to satisfaction made by note or bill; and the tendency of the courts seems to be in favor of relaxing the rule as unreasonable, and not in ac-

¹⁷⁶ *Robbins v. Cheek*, 32 Ind. 328. But he could not sue, on the original note, for the interest after the principal was paid, *Comparet v. Ewing*, 8 Blackf. (Ind.) 328; *Moore v. Fuller*, 47 N. C. 205; or after payment of a judgment which did not include the interest, *Couch v. Waring*, 9 Conn. 281. And a holder who has received dividends from the insolvent estates of the maker and indorser, equal to the full amount of the principal and interest accrued up to the date of filing proof of his claim, cannot receive further dividends to cover subsequently accruing interest, until the claims of other creditors are also paid up to the full extent proved. *Blake v. Ames*, 8 Allen (Mass.) 318.

¹⁷⁷ The note being surrendered at the time. *Hall v. King*, 2 Colo. 711.

¹⁷⁸ *Byles, Bills*, 232; *Fitch v. Sutton*, 5 East, 230; *Lathrop v. Page*, 129 Mass. 19; *Price v. Cannon*, 3 Mo. 453.

¹⁷⁹ *Fenwick v. Phillips*, 3 Metc. (Ky.) 87.

¹⁸⁰ *Bliss v. Shwartz*, 65 N. Y. 444.

¹⁸¹ *Missouri Loan Bank v. Garner*, 1 Mo. App. 200. So, the receipt on a note, from one of several guarantors, of "his part * * * in full for his part," will not discharge him as to the balance. *Carrier v. Jones*, 68 N. C. 127; *Griffith v. Grogan*, 12 Cal. 317.

¹⁸² *Price v. Cannon*, 3 Mo. 453. And, conversely, money paid for an extension cannot be afterwards pleaded by the maker as a part payment. *Walker v. Villavaso*, 18 La. Ann. 715.

cordance with actual commercial usage or convenience.¹⁸³ Thus, part payment by a third party, received expressly in full satisfaction, is available as such.¹⁸⁴ So, it has been held that the payment of principal, received in full satisfaction of principal and interest due, will discharge the claim for interest.¹⁸⁵ So, where the holder has accepted payment of the face of the bill, without the costs, after suit brought, he cannot bring a further action for nominal damages or costs.¹⁸⁶

Part Payment by Joint Maker—Indorser—Drawer.

§ 1411. One joint maker may pay part of the note, and even be discharged absolutely by the payee, without effecting the discharge of his co-makers.¹⁸⁷ And it is expressly provided by statute in Virginia that a creditor may release a joint debtor without discharging his co-obligors; but he must in such case deduct his full share from the balance claimed as due from the others, or, if the party paying was a surety, the amount actually paid by him must be deducted.¹⁸⁸

If part payment is made by the indorser of a note, and discharge obtained by him as a bankrupt, the holder may still prove the whole amount of the note as a debt due from the bankrupt maker,¹⁸⁹ or acceptor,¹⁹⁰ holding any excess that may be recovered over and above the balance due to him as trustee for such indorser. But after receiving such dividend from the indorser's estate he can only prove against the bankrupt drawer for the balance remaining due.¹⁹¹ So, if the divi-

¹⁸³ 2 Pars. Notes & B. 217.

¹⁸⁴ Byles, Bills, 232; Chit. Bills, 442; 2 Pars. Notes & B. 217; Welby v. Drake, 1 Car. & P. 557.

¹⁸⁵ Byles, Bills, 232; 2 Pars. Notes & B. 218; Beaumont v. Greathead, 3 Dowl. & L. 631, 2 C. B. 494.

¹⁸⁶ Thame v. Boast, 12 Q. B. 808.

¹⁸⁷ Ruggles v. Patten, 8 Mass. 480. So, in case of judgment by *cognovit* against one joint maker, and levy of part under *fi. fa.* against him. Ayrey v. Davenport, 2 Bos. & P. (N. R.) 474.

¹⁸⁸ VIRGINIA (Code, c. 135, §§ 2856, 2857).

¹⁸⁹ *In re Ellerhorst*, 5 N. B. R. 144, Fed. Cas. No. 4,381; *In re Souther*, 9 N. B. R. 502, Fed. Cas. No. 13,184; *Ex parte Talcott*, 2 Low. 320, Fed. Cas. No. 13,184.

¹⁹⁰ *Ex parte De Tastet*, 1 Rose, 10.

¹⁹¹ *Cooper v. Pepys*, 1 Atk. 106.

dividend is received from the drawer's estate, he can only make proof against the acceptor's estate for the balance due.¹⁹²

Part Payment by Acceptor—Maker.

§ 1412. If part payment is made by the acceptor of a bill, it will not discharge the drawer, but will inure to his benefit as a discharge *pro tanto*; ¹⁹³ and proof can be made against the drawer's estate for the balance.¹⁹⁴ But after part payment by an accommodation acceptor, the holder may still prove for the entire amount against the drawer accommodated, and the acceptor (being in fact a surety) may apply to the court to have all excess above the balance due the holder paid into court for his benefit.¹⁹⁵

On the other hand, where a bill is proved by the holder against acceptor and indorser, and dividends are received from both estates on the full amount of the bill, and the balance of the dividend due to the holder from the indorser's estate, after paying the holder in full, is paid to the acceptor (who had been guarantied by the indorser) as a dividend on the amount paid by his estate to the holder, no further proof can be made in favor of the acceptor's estate against the indorser's estate on the ground of the double liability incurred by the indorser.¹⁹⁶

The holder of a note may prove for its full amount against the bank-

¹⁹² Where the bill was accepted for the accommodation of the drawer, *Ex parte Tayler*, 1 De Gex & J. 302; *In re Oriental Commercial Bank*, L. R. 6 Eq. 582, although the claim against the acceptor had been sworn to, and informally entered, before the dividend from the drawer was received or declared, *Ex parte Royal Bank of Scotland*, 2 Rose, 197.

¹⁹³ *Kennedy v. Motte*, 3 McCord (S. C.) 13.

¹⁹⁴ *Ex parte Ryswicke*, 2 P. Wms. 89; *Sohier v. Loring*, 6 Cush. (Mass.) 537; unless the acceptor was without funds and paid the bill for the drawer's accommodation, *Ex parte Ryswicke*, *supra*. But he might have proved his entire claim against acceptor, drawer, and indorser before receiving a dividend from the former. *Sohier v. Loring*, *supra*.

¹⁹⁵ *Downing v. Bank*, 2 Dill. 136, Fed. Cas. No. 4,046. In this case, the acceptor's payment was made by his promissory note, and the drawer became bankrupt before it matured.

¹⁹⁶ *In re Oriental Commercial Bank*, 7 Ch. App. 99, affirming L. R. 12 Eq. 501.

rupt estate of both maker and indorser,¹⁹⁷ and will be entitled to a dividend on the full amount proved against the indorser's estate, after receiving a dividend of one-half the entire amount from the maker's estate.¹⁹⁸ And this is true, although he could only have proved his claim for the balance after such dividend had been received,¹⁹⁹ or even after it had been declared.²⁰⁰

The effect of part payment as a bar to the statute of limitations will be considered in a later part of this work. Its effect as a waiver of demand or notice of dishonor has been already considered.

Foreign Statutes as to Part Payment.

§ 1413. Many foreign statutes require the holder to receive any partial payment that is tendered.²⁰¹ This is the rule in Germany, although the bill may have been accepted for the entire amount of its face.²⁰² But it is not required in Hungary, where the payment offered is less than one-half of the bill.²⁰³ By the Spanish Code the

¹⁹⁷ *Miller's Estate*, 82 Pa. St. 113; *Blake v. Ames*, 8 Allen (Mass.) 318. *National Mount Wollaston Bank v. Porter*, 122 Mass. 308. But in Illinois he must collect what he can from the maker before suit against the indorser. *White v. Clayes*, 32 Ill. 325.

¹⁹⁸ Notwithstanding a full dividend already paid by the indorser's estate to the payee of the note after its transfer to the plaintiff, and in ignorance of such transfer. *National Mount Wollaston Bank v. Porter*, *supra*. But see *Benj. Chalm. Dig. art. 234*.

¹⁹⁹ *Ex parte Lefebvre*, 2 P. Wms. 407. So, after a voluntary part payment by the maker. *Ex parte Harris*, 2 Low. 568, Fed. Cas. No. 6,109. In that case he may prove for the whole balance against several bankrupt indorsers, but cannot receive, in all, more than his entire claim. *In re Howard*, 4 N. B. R. 571, Fed. Cas. No. 6,750.

²⁰⁰ *Ex parte Leers*, 6 Ves. 644.

²⁰¹ BELGIUM (Code Nap.); DENMARK (Exch. Law, § 58); FRANCE (Code Com. art. 156); GREECE (Code Nap.); GUATEMALA (Ord. Bilbao, § 30); HAYTI (Code Nap. § 153); HOLLAND (Exch. Law, art. 168); HONDURAS (same as "Guatemala"); ITALY (Code Com. art. 242); PORTUGAL (Code Com. arts. 389, 390); RUSSIA (Exch. Law, art. 612); SAN DOMINGO (Code Nap.); SWEDEN (Exch. Law, § 41); TURKEY (Code Nap. § 113); URUGUAY (Code Com. art. 888); VENEZUELA (Code Com. art. 59).

²⁰² AUSTRIA (Exch. Law, art. 38); GERMANY (Exch. Law, art. 38); SWITZERLAND (Ob. R. 757).

²⁰³ HUNGARY (Exch. Law, § 116).

holder need not receive any partial payment.²⁰⁴ In nearly all countries, however, a part payment, received from the acceptor or maker, inures to the benefit of the drawer and indorsers.²⁰⁵

Receipt for Payment.

§ 1414. By the law merchant, the person making payment cannot demand a receipt from the person receiving it.²⁰⁶ And it is not a sufficient tender of payment if the payor insists on a receipt in full of all demands.²⁰⁷ So, one who tenders payment of a lost note cannot insist on more than a receipt for the payment and a cancellation of the mortgage securing it.²⁰⁸ But one who pays a bill may demand a receipt by the statute now in force in Great Britain.²⁰⁹ And in some foreign countries the holder is required to give a receipt on the bill itself acknowledging payment.²¹⁰

²⁰⁴ BOLIVIA (Code Com. art. 403); CHILI (Code Com. art. 713); COLOMBIA (Code Com. art. 456); COSTA RICA (Code Com. art. 449); ECUADOR (Code Com., as in "Spain"); MEXICO (Code Com. art. 394); NICARAGUA (Code Com. art. 278); PERU (Code Com. art. 457); SALVADOR (Code Com. art. 455); SPAIN (Code Com. art. 502).

²⁰⁵ ARGENTINE REPUBLIC (Code Com. art. 871); BELGIUM (Code Nap.); BOLIVIA (Code Com. art. 395); COLOMBIA (Code Com. art. 464); COSTA RICA (Code Com. art. 457); ECUADOR (Code Com., as in "Spain"); FRANCE (Code Com. art. 156); GREECE (Code Nap.); HAYTI (Code Nap.); ITALY (Code Com. art. 242); MEXICO (Code Com. art. 402); PORTUGAL (Code Com. art. 389); SALVADOR (Code Com. art. 463); SAN DOMINGO (Code Nap.); SPAIN (Code Com. art. 510); TURKEY (Code Nap.); URUGUAY (Code Com. art. 888).

²⁰⁶ Edw. Bills & N. § 784; Story, Prom. Notes, § 452. But such demand is immaterial, if not objected to at the time. *Cole v. Blake, Peake*, 179. In like manner, it is not necessary that the payee should indorse the note on receiving payment. *Osborn v. Gheen*, 5 Mackey (D. C.) 189.

²⁰⁷ *Thayer v. Brackett*, 12 Mass. 450.

²⁰⁸ *Holton v. Brown*, 18 Vt. 224.

²⁰⁹ 43 Geo. III. c. 126, § 5. Although this was formerly held not to be the rule. *Chit. Bills*, 477; *Cole v. Blake, Peake*, 179; *Green v. Croft*, 2 H. Bl. 30. And he cannot demand a stamped receipt unless he can produce it for the other party to sign. *Laing v. Meader*, 1 Car. & P. 257.

²¹⁰ AUSTRIA (Exch. Law, art. 39); CHILI (Code Com. art. 721); GERMANY (Exch. Law, art. 39); HOLLAND (Exch. Law, art. 107); HUNGARY (Exch. Law, § 119); PORTUGAL (Code Com. art. 388); SWEDEN (Exch. Law, § 40).

This is important chiefly in case of part payment, since the instrument is generally canceled or given up on payment in full. Part payment, made on a negotiable instrument, should be noted on the paper itself.²¹¹ And where the instrument comes into the hands of a bona fide holder for value before maturity, with no memorandum or other notice of part payment, it cannot be set up as a defense against him,²¹² even though the prior holder promised, when he received the part payment, that he would indorse it.²¹³

Surrender of Instrument on Payment.

§ 1415. When a bill or note is paid in full, the party who pays it may, and for his own protection should, require that it be surrendered to him.²¹⁴ And a tender of payment of commercial paper will not be rendered invalid by a demand for its surrender.²¹⁵ But an offer to pay upon surrender of the bill is not itself equivalent to payment,²¹⁶ and a valid tender cannot be conditioned on cancellation of a collateral mortgage, as well as a surrender of the note secured.²¹⁷

If the maker of a note pays it without taking a receipt or obtaining the surrender of the instrument, he cannot afterwards insist on its surrender or cancellation in an action brought against himself and the

²¹¹ Chit. Bills, 477; 2 Edw. Bills & N. § 783; *Cooper v. Davies*, 1 Esp. 463; *Kernohan v. Durham*, 48 Ohio-St. 1, 26 N. E. 982.

²¹² *Ward v. Howard*, 88 N. Y. 74; *Emerson v. Cutts*, 12 Mass. 78. So, of payment in full before maturity. *Best v. Crall*, 23 Kan. 482. And see § 1418, *infra*.

²¹³ And the indorsee need not prove that the note was transferred to him before maturity. *Wilbour v. Turner*, 5 Pick. (Mass.) 526.

²¹⁴ *Byles*, Bills, 228; Chit. Bills, 480; 2 Daniel, Neg. Inst. 255; 2 Pars. Notes & B. 215; *Story*, Bills, § 448; *Buzzard v. Flecknoe*, 1 Starkie, 333; *Hansard v. Robinson*, 7 Barn. & C. 90, 9 Dowl. & R. 860; *Davis v. Dodd*, 4 Taunt. 602; *McClelland v. Bartlett*, 3 Ill. App. 481. And see § 1131, *supra*. And all parts that have been accepted or protested should be surrendered. § 241, *supra*. And a bill cannot be held for contingent costs in a pending bankruptcy proceeding, if the amount due, with costs of suit, is tendered. *Cornes v. Taylor*, 10 Exch. 441.

²¹⁵ *Wilder v. Seelye*, 8 Barb. (N. Y.) 408. And when paid it must be surrendered, although it may not have matured yet. *Union Sav. Ass'n v. Clayton*, 6 Mo. App. 587.

²¹⁶ *Williams v. Gottschalk*, 6 Mo. App. 597.

²¹⁷ *Storey v. Krewson*, 55 Ind. 397.

indorser jointly, although he is entitled to a nonsuit in such case.²¹⁸ But he may bring an action of trover against the holder, on his refusal to surrender it after it is paid.²¹⁹ If a bill is not surrendered, the presumption is that it is not paid.²²⁰ And if a holder by delivery from the payee dies, and the bill is found in his possession, and put into suit by his administrator in the name of the payee, the plaintiff will not be liable for costs, although the bill was in fact paid.²²¹ So, if a note is renewed, the original note will be presumed to have been surrendered, and need not be produced in an action upon the renewal;²²² and it will not be a defense to the renewal that the plaintiff agreed to surrender the original note, and has failed to do so.²²³ But it has been held in such case that judgment may be stayed until it is produced and given up.²²⁴ And where the bill is a foreign bill in several parts, an agreement for its surrender is not satisfied by the surrender of one part.²²⁵

Lost Instruments.

§ 1416. If the bill or note is proved to have been lost, its surrender cannot, of course, be required.²²⁶ It was formerly held that an acceptor could not be compelled, at law, to pay a lost bill, even on an offer of indemnity.²²⁷ But if due indemnity is offered to the maker, he may be required to pay a note on proof of its loss;²²⁸ especially where it was not indorsed, and public notice was given of the robbery in which it was lost many years before.²²⁹ Where a note has been

²¹⁸ *Mercantile Bank v. Pettigrew*, 74 N. C. 326.

²¹⁹ *Otisfield v. Mayberry*, 63 Me. 197.

²²⁰ *Chit. Bills*, 446; *Buzzard v. Flecknoe*, 1 Starkle, 333; *Brembridge v. Osborne*, Id. 374. But its not being surrendered is immaterial as evidence of fraud in a conveyance based on it and other valuable consideration. *Howard v. Ryneerson*, 50 Mich. 307, 15 N. W. 486.

²²¹ *Horton v. Blair*, 2 Bailey (S. C.) 545.

²²² *Lyman v. Bank*, 12 How. 244.

²²³ It appearing that he was ready to surrender it, and had never refused to do so. *Fleiss v. Hellery*, 4 Mo. App. 596.

²²⁴ *Raisin v. Thomas*, 88 N. C. 148.

²²⁵ *Kearney v. West Granada Mining Co.*, 1 Hurl. & N. 412.

²²⁶ *Wain v. Bailey*, 2 Perry & D. 507.

²²⁷ *Story, Bills*, § 448.

²²⁸ *Bridgeford v. Manufacturing Co.*, 34 Conn. 546.

²²⁹ *Lewis v. Petayvin*, 14 Mart. (La.; N. S.) 4.

removed with other assets of a bank, by military orders, on account of the war, the maker will still remain liable for interest, unless he can prove an actual tender.²³⁰ But if a tender is not accepted because the note is mislaid, the liability for interest will end with the tender.²³¹

A certificate of deposit payable in "current funds" is a nonnegotiable note, and, after its loss, recovery may be had against the maker without the necessity for a bond indemnity.²³² So, if a bank note is cut in two for the purpose of safe transmission by mail, neither half is any longer negotiable; and, in case of the loss of one half, recovery may be had on the other on proof of the holder's title.²³³

Nonnegotiable Instruments—Surrender by Mistake—Fraud.

§ 1417. In general, if a bill is not negotiable, it may be safely paid without being actually surrendered by the holder.²³⁴ And payment of a nonnegotiable note to the payee will be good, if the maker has no notice of its transfer, although it is not produced at the time it is paid.²³⁵

Sometimes a note is surrendered by mistake; e. g. where the holder thinks it has been paid. In such case the maker will remain liable for the balance, notwithstanding the surrender of the note.²³⁶ But where a pledgee of the note has surrendered it to his pledgor (the payee) on receiving his check for it, and he surrenders it to the maker, the pledgee cannot afterwards, on the dishonor of the check, recover the note from the maker.²³⁷ And if the payee pretends to surrender the note on its payment to him, and fraudulently substitutes another paper, and assigns the note before maturity (but without indorsement)

²³⁰ *Gates v. Bank*, 12 Helsk. (Tenn.) 325.

²³¹ *Dent v. Dunn*, 3 Camp. 296.

²³² *National State Bank v. Ringel*, 51 Ind. 393.

²³³ *Hinsdale v. Bank*, 6 Wend. (N. Y.) 378; notwithstanding publication of notice by the bank that it would not pay, *Bank of the United States v. Sill*, 5 Conn. 106. But in Virginia the holder must offer indemnity as well as prove his title, and can recover no interest or costs until he does so. *Farmers' Bank v. Reynolds*, 4 Rand. (Va.) 186.

²³⁴ *Byles, Bills*, 233; *Chit. Bills*, 446; 2 *Edw. Bills & N.* § 787; *Wain v. Bailey*, 10 Adol. & El. 616, 2 *Perry & D.* 507.

²³⁵ *Hart v. Freeman*, 42 Ala. 567.

²³⁶ *Banks v. Marshall*, 23 Cal. 223.

²³⁷ *Citizens' Nat. Bank v. Hooper*, 47 Md. 88.

to a bona fide purchaser, the payment will be good as against such purchaser, unless he can prove that the fraudulent substitution was due to the maker's own negligence.²³⁸

Surrender on Payment before Maturity.

§ 1418. Where a negotiable bill or note is paid before maturity, it is especially important that it should be surrendered to the payor, and further negotiation thereby prevented. And if payment is made to the payee, and the note is not surrendered, but is afterwards transferred before maturity to a bona fide holder, the holder may recover against the payee in an action for money had and received to his use.²³⁹ Possession of such a note indorsed by the payee in blank is presumptive evidence that the holder is a bona fide purchaser, and payment to the payee is no defense without further proof.²⁴⁰ And an accommodation acceptor cannot set up a payment of the bill by the drawer to the payee as a defense, even against one who afterwards took it from the payee as collateral, without notice and after maturity.²⁴¹ But if the pledgee has taken the note before maturity, with knowledge that the maker had already paid it to the payee upon his receipt, he will take it subject to the defense of such payment.²⁴² In the absence of laches, however, a certificate of deposit, "payable on the return of this certificate properly indorsed," may be recovered against the maker by a bona fide holder, notwithstanding a previous payment to the original depositor.²⁴³

If payment of a bill or note is made to the payee, but the paper is

²³⁸ *Miller v. Tharel*, 75 N. C. 148.

²³⁹ *Connecticut & P. R. R. Co. v. Newell*, 31 Vt. 364; *Best v. Crall*, 23 Kan. 342. But the maker could not recover from the payee a payment voluntarily made upon the payee's guaranty against damage from loss of the bill. *Alexander v. Strong*, 9 Mees. & W. 733.

²⁴⁰ *Paris v. Moe*, 60 Ga. 90.

²⁴¹ *Bosanquet v. Dudman*, 1 Starkie, 1.

²⁴² *White v. Kibling*, 11 Johns. (N. Y.) 128. So, if purchased long after maturity, without notice (a receipt acknowledging payment, and promising to "give up the note when called for," being no authority to the payee to reissue it). *American Bank v. Jenness*, 2 Metc. (Mass.) 288.

²⁴³ *National Bank of Ft. Edward v. Washington Co. Nat. Bank*, 5 Hun (N. Y.) 605. In this case seven years had elapsed since the date of the certificate.

not produced or surrendered by the payee, and has been previously transferred, the purchaser will not be affected by such payment.²⁴⁴ But a part payment to the payee will be good in such case, if the purchaser holds the note as collateral for a debt that is fully covered by the balance still left unpaid.²⁴⁵ And, conversely, payment to a pledgee whose claim was paid, and who did not then surrender the note, but has since returned it to the payee, will not be binding upon the payee.²⁴⁶

Statutes Requiring Surrender on Payment.

§ 1419. By the California Code, one who pays a negotiable instrument may demand its surrender, or, if the party receiving payment has a right to retain the paper, he may demand a receipt or release on the instrument itself, or a bond of indemnity, if it is lost.²⁴⁷ In Vermont, a release must be given if the instrument is destroyed; and, where payment is made in other cases by an indorser or surety, he may recover the amount paid and be discharged from his liability, if the holder fails to surrender the bill on such payment.²⁴⁸

In other countries, surrender of the bill is necessary to a complete discharge.²⁴⁹ And in case of partial payment the receipt must be indorsed on the instrument.²⁵⁰ And some statutes require the surrender of any part that has been accepted,²⁵¹ or indemnity, in default of such surrender,²⁵² in order to effect a complete discharge as against

²⁴⁴ *Gosling v. Griffin*, 13 Alb. Law J. 173; *Mayo v. Moore*, 28 Ill. 428. So, if it has been transferred or pledged as collateral, *Griswold v. Davis*, 31 Vt. 390; the pledge having been made before the note became due, *Best v. Crall*, 23 Kan. 342.

²⁴⁵ *Grant v. Kidwell*, 30 Mo. 455.

²⁴⁶ *Wheeler v. Guild*, 20 Pick. (Mass.) 545.

²⁴⁷ CALIFORNIA (Civ. Code, § 3137); NORTH DAKOTA (Rev. Codes, § 4804); UTAH (Rev. St. § 1502); WYOMING (Laws 1888, c. 70, § 42).

²⁴⁸ VERMONT (V. S. § 2300).

²⁴⁹ AUSTRIA (Exch. Law, art. 39); GERMANY (Exch. Law, art. 39); LOWER CANADA (Civ. Code, art. 2315).

²⁵⁰ GERMANY (Exch. Law, art. 39); AUSTRIA (Exch. Law, art. 39).

²⁵¹ SWEDEN (Exch. Law, § 40).

²⁵² CHILI (Code Com. art. 718); COLOMBIA (Code Com. art. 458); COSTA RICA (Code Com. art. 451); ECUADOR (Code Com., as in "Spain"); MEXICO (Code Com. art. 396); PERU (Code Com. art. 459); SALVADOR (Code Com. art. 457); SPAIN (Code Com. art. 504).

bona fide holders of the instrument.²⁵³ Others require a surrender of all parts that have been accepted and indorsed,²⁵⁴ or protested,²⁵⁵ or of all parts that have been received.²⁵⁶ But if a bill has been lost, the holder may demand a deposit of the amount, and may protest the bill if it is refused.²⁵⁷

²⁵³ HOLLAND (Exch. Law, art. 161).

²⁵⁴ HUNGARY (Exch. Law, § 120).

²⁵⁵ DENMARK (Exch. Law, § 63).

²⁵⁶ CHILI (Code Com. art. 721).

²⁵⁷ BOLIVIA (Code Com. art. 406); COLOMBIA (Code Com. art. 461); COSTA RICA (Code Com. art. 454); DENMARK (Exch. Law, § 62); ECUADOR (Code Com., as in "Spain"); MEXICO (Code Com. art. 399); SALVADOR (Code Com. art. 460); SPAIN (Code Com. art. 507).

II. PAYMENT—BY WHOM MADE.

- § 1420. Payment by Acceptor.
- 1421. — By Accommodation Acceptor.
- 1422. Reissue by Acceptor.
- 1423. Payment or Purchase—Question of Intention.
- 1424. Discount by Drawee.
- 1425. Payment by Maker.
- 1426. — By Joint Maker.
- 1427. — By Drawer.
- 1429. — By Indorser.
- 1431. Action by Indorser.
- 1432. Payment by Indorser after Judgment.
- 1433. Acceptor Liable to Indorser.
- 1434. Reissue by Indorser.
- 1435. Payment by Principal—Surety.
- 1437. — Supra Protest.
- 1438. — By Stranger.
- 1441. Place of Payment—As Agent.
- 1442. Funds Provided and Lost.

Payment by Acceptor.

§ 1420. The payment of a bill or note, in order to be a discharge of the instrument, should be made by the acceptor or maker, or by some one for him.²⁵⁸ In general, payment made by the acceptor extinguishes the bill,²⁵⁹ and discharges all parties to it.²⁶⁰ And even if the amount paid by him is less than the face of the bill, it will discharge the drawer,²⁶¹ although, if paid by the acceptor in a suit pending against acceptor and drawer jointly, the drawer might still

²⁵⁸ Byles, Bills, 224; Benj. Chalm. Dig. art. 234; Chit. Bills, 442; 2 Pars. Notes & B. 216. If made by the acceptor, he is sometimes said to "retire" the bill. 2 Daniel, Neg. Inst. 269; 2 Edw. Bills & N. § 725.

²⁵⁹ *Elsam v. Denny*, 15 C. B. 87.

²⁶⁰ Benj. Chalm. Dig. art. 234; Story, Bills, § 410; including a co-acceptor, who may, however, be liable for contribution, *Harmer v. Steele*, 4 Exch. 1. And see *Robertson v. Smith*, 18 Johns. (N. Y.) 459; *Boardman v. Paige*, 11 N. H. 431.

²⁶¹ *Tassell v. Lewis*, 1 Ld. Raym. 743; especially if received from the acceptor under an agreement on the holder's part that the acceptor should not be called upon to pay more, *De La Torre v. Barclay*, 1 Starkie, 7.

remain liable for costs.²⁶² Part payment, however, through a sale of collateral received from the acceptor, and surrender and cancellation of the bill by him, will not prevent the holder from proceeding to enforce other collateral received from the drawer, although the ultimate remedy of the drawer against the acceptor may have been impaired by the surrender and cancellation of the bill.²⁶³ But if the acceptor pays part of the bill, and gives his bond and warrant for the balance, the indorser will be discharged.²⁶⁴

Payment by Accommodation Acceptor.

§ 1421. Payment by an accommodation acceptor extinguishes the bill, even as against the drawer who has been accommodated by the acceptance, so far as regards the acceptor's rights against the drawer on the bill.²⁶⁵ But such acceptor may hold the drawer liable on an implied contract for his indemnity, if none is expressed.²⁶⁶ And he may recover against all the drawers, although one was a surety for the others, and was known to the acceptor to be such when he accepted the bill.²⁶⁷ If, on the other hand, he has paid the bill out of the funds of the principal drawer in his hands, it will discharge an accommodation drawer also.²⁶⁸

The law implies a contract on the drawer's part to indemnify one, who accepts a bill for his accommodation.²⁶⁹ And if the drawer is

²⁶² *London & Suburban Bank v. Walkinshaw*, 25 Law T. (N. S.) 704.

²⁶³ *Yglesias v. Bank*, 3 C. P. Div. 60.

²⁶⁴ *English v. Darley*, 2 Bos. & P. 61.

²⁶⁵ 2 Daniel, Neg. Inst. 263; 2 Edw. Bills & N. § 722. And he cannot recover interest after payment at the rate expressed in the draft, but only at the rate fixed by law. *Martin v. Muncy*, 40 La. Ann. 190, 3 South. 640.

²⁶⁶ *Benj. Chalm. Dig. art. 230*; 2 Edw. Bills & N. § 722; *Story, Bills*, § 420; *Christian v. Keen*, 80 Va. 369. And in such action the bill is evidence of the amount paid. 2 Daniel, Neg. Inst. 264. But where the drawer requested him to accept and charge to a third party, he cannot look to the drawer, unless he acted as his agent. *Bell v. Davidson*, 3 Wash. C. C. 328; *Fed. Cas. No. 1,248*.

²⁶⁷ *Suydam v. Westfall*, 2 Denio (N. Y.) 205, reversing 4 Hill (N. Y.) 211, and overruling *Wing v. Terry*, 5 Hill (N. Y.) 160. See, too, *Griffith v. Reed*, 21 Wend. (N. Y.) 502; *Story, Bills*, § 420.

²⁶⁸ *Brander v. Phillips*, 16 Pet. 121.

²⁶⁹ *Dickerson v. Turner*, 15 Ind. 4. But the right of action does not arise

insolvent, the accommodation acceptor may, on payment by him, be subrogated in equity to the position of the holder.²⁷⁰ And after payment he may enforce collateral pledged for his security,²⁷¹ or sue on a mortgage given to indemnify him.²⁷² But until he has paid the bill he can neither sue the drawer nor foreclose a mortgage given for his security.²⁷³

An acceptor may also bring suit against the person for whose account the bill was drawn, where such person requested him to accept the bill "against properly indorsed bills of lading of 8,000 bushels of wheat per Anna on our account," although the bills of lading (on the strength of which the acceptance was given) proved to have been forged by the drawer of the bill of exchange.²⁷⁴

Reissue by Acceptor.

§ 1422. If the bill is in the acceptor's possession at maturity, it is prima facie evidence of its payment,²⁷⁵ although he may be only one of several joint acceptors.²⁷⁶ And after an acceptor has paid a bill

until the acceptor has paid and thereby discharged the drawer. *Porter v. Sandidge*, 32 La. Ann. 449.

²⁷⁰ *Bank of Toronto v. Hunter*, 4 Bosw. (N. Y.) 646. And the maker of a collateral mortgage cannot object to the payment after 16 years, although the bill is slightly misdescribed in the mortgage. *Byers v. Fowler*, 14 Ark. 86.

²⁷¹ Even against an attaching creditor of the drawer. *Printup v. Johnson*, 19 Ga. 73.

²⁷² *Spiller v. Creditors*, 16 La. Ann. 292; but only if the mortgage (made by the drawer of the bill) is expressly for his indemnity, since the bill is presumptively the debt of the acceptor. *Salaun v. Relf*, 4 La. Ann. 575. So, if the payment was made by the drawer's note with the acceptor and indorser of the original bill as sureties, and the acceptor paid the note, and the mortgage was made to the indorser for his personal indemnity. *Gomez v. Lazarus*, 16 N. C. 205.

²⁷³ *Planters' Bank v. Douglass*, 2 Head (Tenn.) 690; nor can the holder foreclose such mortgage. And an acceptor cannot sue a third party on an express guaranty until he has paid the bill. *Chilton v. Whiffen*, 3 Wills. 13.

²⁷⁴ *Woods v. Thiedemann*, 1 Hurl. & C. 495. The acceptor had, in this case, charged the payment in his account, and it was not disputed for two years.

²⁷⁵ *Hays v. Samuels*, 55 Tex. 560; even though he holds it as executor, *Benj. Chalm. Dig. art. 238*.

²⁷⁶ *Benj. Chalm. Dig. art. 238*; *Story, Bills*, § 443; *Harmer v. Steele*, 4 Exch. 1.

of exchange he cannot reissue it as against a co-acceptor²⁷⁷ or drawer.²⁷⁸

If, however, the acceptor discounts or purchases a bill before its maturity (as he may do), he can reissue or transfer it like any other purchaser, and prior parties will remain liable to his indorsee.²⁷⁹ But if the acceptor purchases a bill before its maturity, and the drawer afterwards, before maturity, countermands its payment because of failure of consideration, the bill will be subject to such defense in his hands.²⁸⁰

Payment or Purchase—Question of Intention.

§ 1423. Where a bill is discounted by the bank at which it is payable by the terms of the acceptance, and is afterwards transferred by indorsement, before maturity, and paid by the bank at maturity, it is a question for the jury to determine whether the bank paid it as agent for the acceptor or as indorser;²⁸¹ and, in the latter case, suit would lie against the drawer, but not in the former. And where the bank takes a general receipt, it may be evidence of a purchase instead of a payment as agent for the acceptor or drawer.²⁸²

Whether a transaction of this sort amounts to a payment or a purchase of the bill is purely a question of intention for the jury to determine;²⁸³ and the intention of both parties must concur in a pur-

²⁷⁷ *Harmer v. Steele*, supra.

²⁷⁸ 2 *Daniel*, Neg. Inst. 265. But where the acceptor gave a mortgage to the drawer, and received back the uncanceled bill, and transferred it to a bona fide holder. It has been held that the drawer is liable to such holder, the acceptor's action not amounting to a payment. *Morley v. Culverwell*, 7 Mees. & W. 174.

²⁷⁹ So held, as to the drawer, in *Attenborough v. Mackenzie*, 25 Law J. Exch. 244; and as to an indorser who indorsed before acceptance, in *Rogers v. Gallagher*, 49 Ill. 182; *Swope v. Ross*, 40 Pa. St. 186.

²⁸⁰ *Stark v. Alford*, 49 Tex. 280.

²⁸¹ *Byles*, Bills, 226; *Benj. Chalm.* Dig. art. 234; *Pollard v. Ogden*, 2 El. & Bl. 459. In this case the acceptor's account was overdrawn, and he failed on the day the bill became due, and the jury found that the bank paid as indorser, which the bank might do without so informing the holder.

²⁸² *Graves v. Key*, 3 Barn. & Adol. 313; *Hubbard v. Jackson*, 4 Bing. 390; 1 *Moore & P.* 11.

²⁸³ *Kyne v. Erskine*, 7 Mo. App. 591; *Dougherty v. Deeney*, 45 Iowa, 443; although the payment is made by one who is not a party to the bill, *Wil-*

chase and sale of the bill.²⁸⁴ If it is a payment when made, it cannot afterwards be turned into a purchase by a subsequent indorsement of the instrument.²⁸⁵ And by the law of Holland, if the drawee accepts and pays a renewal bill, it is a payment, and not a purchase, and his taking an assignment of the original collateral mortgage is no evidence of an intention to keep the bill alive.²⁸⁶

Discount by Drawee.

§ 1424. The drawee of a bill may discount it after refusing to accept, and may sue the drawer upon it.²⁸⁷ He may or may not be

coxon v. Logan, 91 N. C. 449; *Swope v. Leffingwell*, 72 Mo. 348. As to such payments, see § 1438, *infra*.

²⁸⁴ 2 Daniel, Neg. Inst. 251; 2 Edw. Bills & N. § 728. If a note is once paid, it cannot be upheld as a subsisting debt by a mere legal fiction of equitable assignment. *Rolfe v. Wooster*, 58 N. H. 526. The following have been held to be a purchase: By equitable pledgee, note not canceled, *Carter v. Burr*, 113 U. S. 737, 5 Sup. Ct. 713; by bank acting as holder's agent on return from clearing house, *Holm v. Bank*, 28 C. C. A. 297, 84 Fed. 119; by maker procuring surrender of note for satisfaction of a judgment against the payee, and delivering the note to the judgment creditor, *Flournoy v. Harper*, 81 Ala. 497, 1 South. 545; by agent who sold paper, taking up coupons as business custom. *Champion v. Investment Co.*, 45 Kan. 103, 25 Pac. 590; by officer of collecting bank, supposing he had made default, and taking transfer from bank, *Fogarty v. Wilson*, 30 Minn. 289, 15 N. W. 175; by a guarantor after discontinuing previous express agreement to pay checks of drawer, *Voltz v. Bank*, 158 Ill. 532, 42 N. E. 69. And the following have been held to be a payment: By bank, having running account with maker, marking the paper paid, and charging it, and taking from maker other unsecured notes, *United Waterworks Co. v. Farmers' Loan & Trust Co.*, 27 C. C. A. 92, 82 Fed. 144; by collecting bank having no power to sell (to discharge surety), *Fuller v. Bennett*, 55 Mich. 357, 21 N. W. 433; by guarantor taking up note indorsed "without recourse," and holding as against later notes secured by same collateral, *Ferree v. Trust Co.*, 21 C. C. A. 83, 74 Fed. 769. The question is one of agreement between the holder and the third person making payment, irrespective of the understanding of the maker of the note with such third person. *Binford v. Adams*, 104 Ind. 41, 3 N. E. 753.

²⁸⁵ *Moran v. Abbey*, 58 Cal. 163; or by a subsequent agreement that a receipt already indorsed should take effect as a transfer, *McCoon v. Biggs*, 2 Hill (N. Y.) 121.

²⁸⁶ *Wilkinson v. Simson*, 2 Moore, P. C. 275.

²⁸⁷ *Desha v. Stewart*, 6 Ala. 852.

under an obligation to the drawer to accept and pay the bill.²⁸⁸ Thus, a bank is liable to its depositors, by implied agreement, to pay their checks when presented,²⁸⁹ or, if not then in funds, within a reasonable time after receiving funds;²⁹⁰ and it cannot refuse to pay a check on mere suspicion of fraud on the drawer's part (an executor or trustee) against the trust funds.²⁹¹ But a London bank may, by custom, refuse payment of a postdated check even on the day it bears date.²⁹²

Payment by Maker.

§ 1425. If a promissory note is paid by the maker, it is, in general, extinguished,²⁹³ and the payment discharges the indorsers and sureties.²⁹⁴ Whether the payment was made by the maker or by an indorser is a question of fact for the jury.²⁹⁵ A note ceases to be negotiable after it is paid.²⁹⁶ But a bill or note may be reissued after it

²⁸⁸ See § 589, *supra*.

²⁸⁹ *Rolin v. Steward*, 14 C. B. 595; but not to pay checks in excess of the drawer's deposit, *Decatur Nat. Bank v. Murphy*, 9 Ill. App. 112.

²⁹⁰ *Marzetti v. Williams*, 1 Barn. & Adol. 415.

²⁹¹ *Gray v. Johnston*, 3 H. L. Cas. 1.

²⁹² *Emanuel v. Robarts*, 9 Best & S. 121.

²⁹³ *Ballard v. Greenbush*, 24 Me. 336. And see § 682, *supra*. And it cannot afterwards be transferred by him, as against other parties, although indorsed to him by the last holder. *Long v. Bank*, 1 Litt. (Ky.) 290. But it has been held that receiving a town order in payment of taxes is not a payment of the order. *Willey v. Greenfield*, 30 Me. 452.

²⁹⁴ 2 Edw. Bills & N. §§ 721, 724; *Woods v. Woods*, 127 Mass. 141. So, a payment by the maker's executor, although the indorser had given his own note in renewal, and said he meant to hold the original note against the maker's estate (which was insolvent), and afterwards had it transferred to a third person. *Borst v. Bovee*, 5 Hill (N. Y.) 219. And payment by the maker is a defense at law, and therefore no ground for an injunction in equity. *Williams v. Stewart*, 56 Ga. 663.

²⁹⁵ *Woods v. Woods*, *supra*. But although the maker's name appears as second and as fourth indorser, it will not be presumed, in an action against the third indorser, that it was the maker who afterwards took up and indorsed the note. *Currie v. Bank of Mobile*, 8 Port. (Ala.) 360.

²⁹⁶ *Blake v. Sewell*, 3 Mass. 556. And school bonds or other securities of a municipal corporation cannot be reissued after they have been paid. *Board of Education v. Sinton*, 41 Ohio St. 504; *Mitchell v. Inhabitants of Albion*, 81 Me. 482, 17 Atl. 546.

is paid, without prejudice to other parties.²⁹⁷ And although the payment by the maker is made indirectly to the payee, and through him to the holder, it will discharge all indorsers.²⁹⁸ And it has been held that, if a note is paid by a transfer of land by the maker, it cannot be afterwards revived between the maker and payee by a fresh consideration moving to the maker,²⁹⁹ although in such case the party who reissues the note is estopped from alleging the payment in his own defense.³⁰⁰ But even if a note is paid by the maker with borrowed money it is a payment, and the maker cannot keep it or a collateral lien alive by a subsequent transfer to the lender of the money.³⁰¹

On the other hand, the maker may purchase his own note as agent for another, and reissue it,³⁰² without discharging other parties.³⁰³ So,

²⁹⁷ *Eaton v. McKown*, 34 Me. 510; but not otherwise, *Cochran v. Wheeler*, 7 N. H. 202; *Havens v. Huntington*, 1 Cow. (N. Y.) 387. And the purchaser of a paid note after maturity takes it subject to defense, although without notice. *Elgin v. Hill*, 27 Cal. 372.

²⁹⁸ *Brown v. Davies*, 3 Term R. 80.

²⁹⁹ *Ryan v. Doyle*, 79 Ky. 363.

³⁰⁰ *International Bank v. Bowen*, 80 Ill. 541. And where a promissory note, secured by mortgage to a trustee, is paid by the maker by other notes secured by another mortgage to the same trustee, and the original note is reissued by the maker to a bona fide holder before maturity, through the same trustee, both maker and trustee are estopped from setting up satisfaction of the first note in favor of the second mortgagee. *Jordan v. Forlong*, 19 Ohio St. 89.

³⁰¹ *Turnbull v. Thomas*, 1 Hughes, 172, Fed. Cas. No. 14,243. So, a fortiori, where the maker borrows the money to pay the second and third notes secured by a mortgage (but does not pay them), and agrees with the lender that he should be subrogated to the mortgage, and the payee of the notes neither receives the payment nor assents to the agreement, but has received from the maker payment of the first note secured by the mortgage. *Hoyle v. Cazabat*, 25 La. Ann. 438. For cases where the borrower himself makes the payment, acting as agent for the maker or as a purchaser at the maker's request, see *infra*, § 1440.

³⁰² *Bowman v. St. Louis Times*, 87 Mo. 191. But see, contra, as to effect on surety, *Cason v. Heath*, 86 Ga. 438, 12 S. E. 678. And where a bill, accepted for the drawer's accommodation, is discounted for the drawer, and the proceeds used to take up a note made by the drawer, which is thereupon returned to him and sent by him to the accommodation acceptor, and the

³⁰³ *Du Bois v. Stoner*, 11 Ill. App. 403; the maker, in this case, taking the note by an indorsement in blank.

he may discount and transfer it again before maturity, and his possession before maturity will raise no presumption that it has been paid;³⁰⁴ and the note will be valid in the hands of a bona fide purchaser before maturity,³⁰⁵ but subject to defense at the suit of purchasers after maturity.³⁰⁶

Payment by Joint Maker.

§ 1426. A joint note,³⁰⁷ or a joint and several note,³⁰⁸ is discharged by payment made by one of the makers; and a verdict in favor of one joint maker on a plea of payment is a discharge of all.³⁰⁹ One cannot pay a note and reissue it, so as to bind his co-maker,³¹⁰ but he may have his action against the other for contribution;³¹¹ and, if he transfers the note for value after paying it, it will transfer his right to

bill is afterwards paid by the acceptor, and the amount reimbursed to him by the payee, on a retransfer of the note to the payee, it has been held that the note was not paid by the maker, and was still in force in the hands of the payee. *Hopkins v. Detwiler*, 25 W. Va. 734.

³⁰⁴ *Mishler v. Reed*, 76 Pa. St. 76. So, if discounted by the maker on the day of its date, with names of indorsers indorsed on it. *Eckert v. Cameron*, 43 Pa. St. 120.

³⁰⁵ *Byles, Bills*, 173; *Story, Prom. Notes*, § 180; *Mishler v. Reed*, 76 Pa. St. 76; *Eckert v. Cameron*, 43 Pa. St. 120. And see § 680.

³⁰⁶ But if transferred to the maker before maturity, and by him, after maturity to the plaintiff, a co-maker will be liable to such plaintiff. *Gordon v. Wansey*, 21 Cal. 77.

³⁰⁷ *Cox v. Hodge*, 7 Blackf. (Ind.) 146; *Swem v. Newell*, 19 Colo. 397, 35 Pac. 734. So, where one partner takes up a note made by the other partner for a firm debt, it extinguishes the note, and he can hold the maker only by an accounting. *Sprague v. Alnsworth*, 40 Vt. 47.

³⁰⁸ *Beaumont v. Greathead*, 2 C. B. 494.

³⁰⁹ *Lenoir v. Moore*, 61 Miss. 400.

³¹⁰ *Patch v. King*, 29 Me. 448; *James v. Yaeger*, 86 Cal. 184, 24 Pac. 1005; although the maker who pays is surety for the other. *Hopkins v. Farwell*, 32 N. H. 425.

³¹¹ *McClatchie v. Durham*, 44 Mich. 435, 7 N. W. 76; *Judd v. Small*, 107 Ind. 399, 8 N. E. 284; but not in the payee's name, although only half the amount is receipted on the note (with the understanding that the payee should collect the balance, for the maker who paid, from his co-maker), *Davis v. Stevens*, 10 N. H. 188. He is entitled, however, to be subrogated (for the protection of his right to contribution) to whatever rights and securities may be held by the payee. *Durac v. Ferrari*, 25 La. Ann. 80; *Ackerman's Appeal*,

demand contribution from the other makers.³¹² If several joint makers are discharged by the statute of limitations, and one who is not discharged is obliged to pay, he may bring suit for contribution against either of the others without joining all of them.³¹³ And if the joint maker who pays the note signed it for the accommodation of his co-maker, he is entitled to be exonerated by him.³¹⁴

Part payment by one joint maker inures to the benefit of all.³¹⁵ And if a payment made by one partner in an attempted compromise is insufficient for that end, by a mistake made in the amount, it will avail as a satisfaction pro tanto for all.³¹⁶ Where the several makers are, however, members of an unincorporated company, it is a question of intention whether the one who paid the note became a purchaser of it, or satisfied and discharged it.³¹⁷

Payment by Drawer.

§ 1427. If a bill of exchange is paid by the drawer, it is not thereby discharged,³¹⁸ but the acceptor still remains liable on it.³¹⁹ An acceptor for the drawer's accommodation will, however, be discharged

20 Cent. Law J. 97, 15 Wkly. Notes Cas. 294; *Fitch v. Hammer*, 17 Colo. 591, 31 Pac. 336.

³¹² The note being available as evidence of the payment. *Dillenbeck v. Dygert*, 97 N. Y. 303.

³¹³ *Boardman v. Page*, 11 N. H. 431.

³¹⁴ And may sue at his option, either on the implied agreement or on the defendant's written agreement to the same effect. *Gibbs v. Bryant*, 1 Pick. (Mass.) 118.

³¹⁵ And also binds all; e. g. by barring the statute of limitations. *Turner v. Ross*, 1 R. I. 88. But a part payment by one joint maker for his personal discharge will not release the other, *Winslow v. Brown*, 7 R. I. 95; especially where the payment is made by a surety with money furnished by his principal and co-maker, and the liability of the latter is expressly reserved, *Harrison v. Close*, 2 Johns. (N. Y.) 448.

³¹⁶ *Easton v. Strother*, 57 Iowa, 506, 10 N. W. 877.

³¹⁷ *Klapp v. McChesney*, 66 Ill. 460.

³¹⁸ *Benj. Chalm. Dig.* art. 234.

³¹⁹ *Callow v. Lawrence*, 3 Maule & S. 95. But see, contra, if paid in anticipation of acceptance, *Bacon v. Searles*, 1 H. Bl. 88. And if the drawer voluntarily pays the statutory damages before the bill is protested for non-acceptance he cannot recover them from the acceptor. *Morris v. Tarin*, 1 Dall. 147.

if the drawer pays the bill.³²⁰ And a dividend received from the insolvent estate of the drawer will discharge an acceptor pro tanto, at the suit of a holder with notice (although the acceptance was not strictly for the drawer's accommodation), if the drawer could not have sued the acceptor because of the balance in their account being largely in the acceptor's favor.³²¹ But the drawer who pays a bill may, in general, bring his action on it against the acceptor, if the acceptance was not for his own accommodation.³²² And in such suit the drawer's possession of the bill is prima facie evidence of the payment by him.³²³ But in an action against an accommodation acceptor upon a bill payable to the drawer's order, and indorsed by him, a memorandum on the face of the bill, "Due on 15th Sept.," is not evidence, without indorsement, to show a prior negotiation of the bill and payment by the drawer.³²⁴

If the drawer takes the bill up, an action may be brought for his use in the payee's name against the acceptor.³²⁵ And the acceptor cannot set up the payment by the drawer in his own defense,³²⁶ either in bar of the action or to reduce the damages.³²⁷

§ 1428. — In like manner, the acceptor of a bill, in an action brought by the holder, is not discharged by payment on the drawer's part,³²⁸ although it was formerly held that he was only liable in such

³²⁰ Byles, Bills, 225; *Lazarus v. Cowie*, 3 Q. B. 459; *Parr v. Jewell*, 16 C. B. 684. But not if the drawer merely gives his bond and warrant in payment. *Smith v. Knox*, 3 Esp. 46.

³²¹ *Cook v. Lister*, 13 C. B. (N. S.) 543.

³²² *Benj. Chalm. Dig. art. 234*; *Story, Bills*, § 422; the acceptance having been credited to the acceptor as payment on an account. *Louviere v. Lau-bray*, 10 Mod. 36.

³²³ *Drew v. Phelps*, 18 N. H. 572. But see, as to the necessity of an indorsement by the payee to the drawer in such case, *Thompson v. Flower*, 1 Mart. N. S. (La.) 301; *Price v. Sharp*, 24 N. C. 417.

³²⁴ *Jewell v. Parr*, 13 C. B. 909; since the memorandum, which was in another handwriting, might have been made when the drawer was about to get the bill discounted.

³²⁵ *Williams v. James*, 15 Q. B. 498; *Davis v. McConnell*, 3 McLean, 391, Fed. Cas. No. 3,640.

³²⁶ *Williams v. James*, supra.

³²⁷ *Randall v. Moon*, 12 C. B. 261.

³²⁸ Byles, Bills, 224; 2 Daniel, Neg. Inst. 264; *Johnson v. Kennion*, 2 Wills. 262; *Walwyn v. St. Quintin*, 1 Bos. & P. 658; *Agra & Masterman's Bank v. Leighton*, L. R. 2 Exch. 56, 4 Hurl. & C. 656.

case for whatever deficiency might remain due to the holder.³²⁹ Where the holder has already received payment in whole or part from the drawer, he holds the bill to that extent as trustee for him.³³⁰ But the acceptor is entitled to a defense of set-off or failure of consideration, which would have been available against the drawer, although the drawer became bankrupt after paying the bill.³³¹ And if the drawer has paid in part, the set-off will be good pro tanto, the holder being the drawer's trustee to that extent, and standing in his place.³³²

On payment of the bill, the drawer may reissue it, and it will then be equivalent to a new bill drawn by himself,³³³ and will be binding on the acceptor,³³⁴ but not on a prior accommodation acceptor,³³⁵ or an indorser.³³⁶

³²⁹ *Hemming v. Brook*, 1 Car. & M. 57; *Scholey v. Ramsbottom*, 2 Camp. 485.

³³⁰ *Byles, Bills*, 225; 2 Daniel, Neg. Inst. 264; *Jones v. Broadhurst*, 9 C. B. 173; *Randall v. Moon*, 12 C. B. 261. And it is not necessary to aver that the payment was made at the acceptor's request, either at the suit of the drawer, *Jones v. Broadhurst*, supra; or of his indorsee, *Agra & Masterman's Bank v. Leighton*, supra. In the words of Cresswell, J., in *Jones v. Broadhurst*, 9 C. B. 182: "Payment of the bill by a drawer or an indorser may or may not, according to circumstances, entitle the party paying to the possession of the bill. There may be a satisfaction of the bill between such parties, which may not entitle them to the possession of the bill. The plea in question has no statement to the effect that the drawers, by reason of the satisfaction made, were entitled to have the bill delivered up. It only states that the plaintiffs hold the bill against the consent of the drawers, which is by no means equivalent to a statement that they were entitled to have the bill delivered to them."

³³¹ *Jones v. Broadhurst*, 9 C. B. 173; *Randall v. Moon*, 12 C. B. 261. On the other hand, if the acceptor had assigned certain book accounts to secure his acceptance, and afterwards became bankrupt, the drawer would be entitled to have them applied for his benefit only if he paid the bill. *Ex parte Mann*, 5 Ch. Div. 367.

³³² *Thornton v. Maynard*, L. R. 10 C. P. 695.

³³³ *Benj. Chalm. Dig. art. 234*; 2 Daniel, Neg. Inst. 268.

³³⁴ *Callow v. Lawrence*, 3 Maule & S. 95. And the acceptor will be liable to the indorsee, although the transfer by the drawer is long afterwards. *Hubbard v. Jackson*, 3 Car. & P. 134, 4 Bing. 390, and 1 Moore & P. 11.

³³⁵ *Benj. Chalm. Dig. art. 234*; *Beck v. Robley*, 1 H. Bl. 89, note; *Jewell v. Parr*, 13 C. B. 909; *Parr v. Jewell*, 16 C. B. 684; *Blenn v. Lyford*, 70 Me. 149; *Bartrum v. Caddy*, 9 Adol. & E. 275.

³³⁶ *Gardner v. Maynard*, 7 Allen (Mass.) 456.

Payment by Indorser.

§ 1429. A bill or note may come back into the hands of an indorser in the course of business without being thereby discharged;³³⁷ and payment of a bill by the indorser does not discharge it.³³⁸ Money received by the holder from the payee is prima facie a payment, but it is a question for the jury, to be determined by the circumstances.³³⁹ And it will be a payment by the indorser, although made with money due him in the hands of the principal debtor.³⁴⁰ If payment is made by charging the indorser's account with the note, it will not inure to the benefit of the maker.³⁴¹ But a mere renewal of an accommodation indorsement by a similar indorsement is not such a payment as will enable the indorser to recover of the maker.³⁴²

§ 1430. — When the indorser of a bill or note takes it up at maturity, such payment will, in general, discharge all subsequent parties to it,³⁴³ but will not discharge prior parties.³⁴⁴ The indorser who pays a

³³⁷ *West Boston Sav. Bank v. Thompson*, 124 Mass. 506.

³³⁸ *Benj. Chalm. Dig. art. 234*; *Lanata v. Bayhi*, 31 La. Ann. 229; *Hartzell v. McClurg* (Neb.) 74 N. W. 626; although it was payable to bearer, and discounted for the bearer on his agreement to be liable as indorser; *Bishop v. Rowe*, 71 Me. 263. But payment by the indorser is a discharge where the note was made for his accommodation. *Schultz v. Noble*, 77 Cal. 79, 19 Pac. 182.

³³⁹ *Dougherty v. Deeney*, 45 Iowa, 443. The assent of the holder is necessary to a transfer, although the note is paid by the payee's own check, out of money borrowed for the purpose from the plaintiff. *Lancey v. Clark*, 64 N. Y. 206, affirming 3 Hun (N. Y.) 575.

³⁴⁰ *National State Bank v. Davis*, 24 Ohio St. 190. In this case, payment by an accommodation indorser without protest, on being informed by the principal debtor that he would not pay, was held to be a payment which he was compelled to make, and to be secured as such by the mortgage given. But if the indorser holds a fund provided by the maker for that purpose, it will create a trust in favor of a prior indorser, as well as of the holder. *Price v. Trusdell*, 28 N. J. Eq. 200.

³⁴¹ *North Nat. Bank v. Hamlin*, 125 Mass. 506.

³⁴² *Lentell v. Getchell*, 59 Me. 135.

³⁴³ *Story, Bills*, § 422; *Howe Mach. Co. v. Hadden*, 8 Biss. 208, Fed. Cas. No. 6,785; *Hayling v. Mullhall*, 2 W. Bl. 1235; *MacDonald v. Bovington*, 4 Term R. 825; *Adrian v. McCaskill*, 103 N. C. 192, 9 S. E. 284. And see § 772, *supra*.

³⁴⁴ *Byles, Bills*, 226; 2 *Daniel, Neg. Inst.* 252; *Story, Bills*, § 422; *Story, Prom.*

note may bring an action on it against the maker.³⁴⁵ And if he has taken it up in the hands of a bona fide purchaser for value before maturity, he will be a purchaser from such holder, and will succeed to his rights, and as such will not be subject to a defense available against the original payee, although it was known to him at the time of indorsing the note.³⁴⁶ And the indorser will be subrogated, on his payment, to a collateral security held against the maker.³⁴⁷ If a payment is made by the indorser after the maker becomes bankrupt, it will not discharge the maker, and proof may be made against the maker's estate for the whole amount of the note.³⁴⁸ And if the note is taken up by the indorser after the maker's death, he will become a creditor of his estate, and entitled to present his claim as such within the time allowed by

Notes, § 400; *Woodward v. Pell*, L. R. 4 Q. B. 55; *Davis v. Miller*, 14 Grat. (Va.) 1; *Bank of Louisiana v. Roberts*, 4 La. 530; *Leeke v. Hancock*, 76 Cal. 127, 17 Pac. 937. In the words of Poland, J., in *Norton v. Downer*, 33 Vt. 26: "The principle seems now to be settled conclusively that, when a note or bill is paid or taken up by any party to it, it not only destroys its negotiability, but extinguishes all right of recovery upon it against all parties subsequent to him upon it, and to whom he would be liable to pay it while they held it, but that as to all parties prior to him, and to whom he has the right to look for payment when the note comes again to his hands by taking it up, he has the same right that he had before he indorsed the first transfer, and that, as against them, he has the same right to again transfer it that he had originally, and that this continues until the note or bill is finally extinguished by being paid by the party liable to make ultimate payment."

³⁴⁵ *Morgan v. Reintzel*, 7 Cranch, 273; *National Bank of Gloversville v. Wells*, 15 Hun (N. Y.) 51. So, against several joint makers, although only one had requested him to sign as indorser. *Hoffman v. Butler*, 105 Ind. 371, 4 N. E. 681. So, although the indorser who took up the note indorsed it for the accommodation of the bank that made it, and although he was himself president of the bank. *Fenn v. Dugdale*, 40 Mo. 63. So, although the bank had indorsed in violation of the banking act for an agreed compensation. *National Bank of Gloversville v. Burr*, 27 Hun (N. Y.) 109. But if the note was made for the indorser's accommodation, he cannot take it up with borrowed money for the benefit of the lender, so as to hold the accommodation maker, unless it is knowingly transferred to him by the bank; but mere surrender on payment is not such a transfer. *Lancey v. Clark*, 64 N. Y. 209.

³⁴⁶ *Barker v. Parker*, 10 Gray (Mass.) 330. And the maker cannot, at the suit of an indorsee, set up payment by the indorser to the plaintiff. *Ticonic Nat. Bank v. Bagley*, 68 Me. 249.

³⁴⁷ *Telford v. Garrels*, 132 Ill. 550, 24 N. E. 573.

³⁴⁸ *In re Souther*, 2 Low. 320, Fed. Cas. No. 13,184.

law, reckoning from the date of the payment.³⁴⁹ In like manner, the indorser who pays a bill or note may bring his action against all prior indorsers who are not otherwise discharged.³⁵⁰ And any dividend afterwards received by the holder from the estate of a bankrupt prior indorser, on proof of claim previously made by him, will be received by him as trustee for the intermediate indorser who has paid the bill.³⁵¹

Action by Indorser.

§ 1431. When an indorser pays a bill, and brings his action against parties primarily liable, he must prove the payment made by him.³⁵² On the other hand, the fact that the note has been canceled by mistake, and marked "Paid," will not prevent his recovery.³⁵³ The indorser who has paid a bill or note may recover the face of the instrument in such action,³⁵⁴ although he has already received a part payment from a prior indorser.³⁵⁵ But he can recover only the amount actually paid, if he has made the payment on behalf of the principal debtor.³⁵⁶ And it has been held that he cannot recover the costs paid by him in resisting a suit against him as indorser.³⁵⁷ His action is

³⁴⁹ *Meriden Steam Mill Lumber Co. v. Guy*, 40 Conn. 163.

³⁵⁰ *Marr v. Johnson*, 9 Yerg. (Tenn.) 1. And if he takes it up at the request of the prior indorser to avoid protest, it will be sufficient consideration for a note by the latter for the amount for which he would have been liable on protest. *Meyer v. Spencer*, 9 Mo. App. 590.

³⁵¹ *Selfridge v. Gill*, 4 Mass. 95.

³⁵² And production of the bill and protest has been held not to be sufficient without a receipt for the payment. *Mendez v. Carreroon*, 1 Ld. Raym. 742. And an agreement as to how payment is to be made by the indorser is not equivalent to payment. *Longfellow v. Andrews*, 45 Me. 75.

³⁵³ *McLemore v. Hawkins*, 46 Miss. 715; *Whitlock v. Manciet*, 10 Or. 166.

³⁵⁴ *Bank of Louisiana v. Roberts*, 4 La. 530; even though he has only paid half the face of the note, and was an accommodation indorser for the maker. *Fowler v. Strickland*, 107 Mass. 552.

³⁵⁵ The part already received from a prior indorser being recovered for the use of such indorser. *Johnson v. Kennlon*, 2 Wils. 262.

³⁵⁶ *Pace v. Robertson*, 65 N. C. 550. And if he pays the debt for which his indorsee pledged the note, he will hold all excess recovered from the maker for the indorsee. *Scott v. Bank*, 71 Ind. 445.

³⁵⁷ *Dawson v. Morgan*, 9 Barn. & C. 618; *Fenn v. Dugdale*, 31 Mo. 580; *Peers v. Kirkham*, 46 Mo. 140; without an express agreement, *Newman v.*

on the note, and not for money paid to the maker's use.³⁵⁸ And an accommodation maker can plead as payment, to such action, that his co-maker, before the action was brought, "fully paid and satisfied the note" by a transfer of certain rents.³⁵⁹

One who becomes guarantor of a note by indorsing it before delivery to the payee, and who takes it up at maturity, may sue the maker as a purchaser.³⁶⁰ And if two joint indorsers take up the note, and one delivers it to the other, the latter may bring suit against the maker in his own name as an indorsee.³⁶¹

Payment by Indorser after Judgment.

§ 1432. Where suits are pending against both indorser and maker, and the indorser pays with the understanding that the holder's suit against the maker shall be continued for his benefit, the payment by the indorser cannot be set up in defense by the maker.³⁶² So, the indorser may take an assignment of a judgment rendered against the maker,³⁶³ or of a judgment rendered jointly against maker and indorser,³⁶⁴ and hold it against the maker. But if he suffers a sale of his property on execution under such judgment rendered in an attach-

Goza, 2 La. Ann. 642. In GEORGIA he may recover the amount paid by him without interest and costs (Code, §§ 2161, 2171). In MARYLAND he may recover the amount paid and interest, including damages paid on foreign bills (Pub. Gen. Laws, art. 13, §§ 2, 5).

³⁵⁸ Howell v. McCracken, 87 N. C. 399; Fenn v. Dugdale, supra.

³⁵⁹ Johnson v. Breedlove, 72 Ind. 368.

³⁶⁰ McGregory v. McGregory, 107 Mass. 543. And one joint indorser may recover his half, although judgment has been recovered by the other for his half. *Id.*

³⁶¹ Havens v. Huntington, 1 Cow. (N. Y.) 387.

³⁶² Mechanics' Bank v. Hazard, 13 Johns. (N. Y.) 353; Madison Square Bank v. Pierce, 137 N. Y. 444, 33 N. E. 557; Mercantile Nat. Bank v. Macfarlane (Minn.) 74 N. W. 287.

³⁶³ Clason v. Morris, 10 Johns. (N. Y.) 525; Folsom v. Carli, 5 Minn. 333 (Gil. 264); on paying a separate judgment against himself, Lyon v. Bolling, 9 Ala. 463. Such judgment may be enforced in Illinois by a creditors' bill. Crawford v. Logan, 97 Ill. 396.

³⁶⁴ Corey v. White, 3 Barb. (N. Y.) 12; Davis v. Perrine, 4 Edw. Ch. (N. Y.) 62; Feamster v. Withrow, 12 W. Va. 611. He is entitled to an assignment of the judgment recovered against both. Allin v. Williams, 97 Cal. 403, 32 Pac. 441. So, by statute in NEW JERSEY (2 Gen. St. p. 2538, § 36). And

ment suit, and assigned to the maker's surety in the attachment, his recovery can only be in a new action against the maker.³⁶⁵

Payment by the indorser is no extinguishment of the bill as against prior indorsers, whether he pays the bill itself or a judgment rendered upon it.³⁶⁶ And an indorser may make payment to a sheriff, after judgment recovered against the sheriff for laches in proceeding against the maker, and may recover on the strength of such payment against a prior indorser.³⁶⁷ An indorser who pays a bill or note may sue prior indorsers in his own name, or in the name of the collecting bank to whom he made the payment.³⁶⁸ And if an indorser is himself released by making a partial payment, it will not inure to the benefit of a prior indorser, so as to discharge him in whole or in part.³⁶⁹

Liability of Acceptor to Indorser.

§ 1433. Payment by an indorser will not discharge the acceptor of a bill, unless the acceptance was made for the accommodation of such indorser.³⁷⁰ And if a bill is accepted and indorsed for the accommodation of the drawer, and is paid by the accommodation indorser, he

this is true although the indorser signed for the accommodation of the maker. *Marsh v. Benedict*, 14 Hun (N. Y.) 317.

³⁶⁵ *March v. Barnet* (Cal.) 51 Pac. 20; and only to the amount credited on the execution after payment of costs, *Id.*, 114 Cal. 375, 46 Pac. 152.

³⁶⁶ *Cotten v. Bradley*, 38 Ala. 506. So, an indorser who takes up a note after a prior indorsement in blank has been filled up specially to his indorsee may hold such prior indorser. *Cole v. Cushing*, 8 Pick. (Mass.) 48. So, an indorser who takes up a note may sue a prior indorser who indorsed it for the maker's accommodation, *Kelly v. Burroughs*, 102 N. Y. 95, 6 N. E. 109; or a guarantor, *Bunker v. Langs*, 76 Hun, 543, 28 N. Y. Supp. 210.

³⁶⁷ *Baker v. Martin*, 3 Barb. (N. Y.) 634.

³⁶⁸ *Bank of America v. Senior*, 11 R. I. 376.

³⁶⁹ *Story, Bills*, § 425; *Bank of Kentucky v. Floyd*, 4 Metc. (Ky.) 159.

³⁷⁰ *Story, Bills*, § 422; although he paid the bill at the drawer's request, *Tomlin v. Lawrence*, 3 Moore & P. 555. And the action may be brought in the name of the indorsee for the use of the indorser. *Williams v. James*, 19 L. J. Q. B. 445. And if part has been paid by the indorser, and the balance by the acceptor, the indorser may recover his part against the acceptor as money paid to his use. *Pownall v. Ferrand*, 6 Barn. & C. 439, 9 Dowl. & R. 603.

will have a right of action against the accommodation acceptor,³⁷¹ as well as against the drawer who was accommodated.³⁷²

But if an indorser pays a bill after judgment recovered by his indorsee against the drawer, but in favor of the surety, he will obtain no rights by such payment against the surety.³⁷³ And if a note is taken up at its maturity by the principal maker and the holder (who had indorsed for collection), the former paying the interest, and the latter paying the principal and retaining the note, the note will be regarded as paid as against the surety, and he will be discharged.³⁷⁴

Even where the indorser has been himself discharged (e. g. by want of notice), and afterwards pays the note, he may still hold a prior indorser who has not been discharged by the holder's laches, either as a purchaser from the holder or in his original capacity as indorsee.³⁷⁵ And in suing such prior indorser it is not incumbent on him to prove due notice of dishonor to himself or other legal compulsion.³⁷⁶ So, an accommodation indorser, after paying the note at its maturity, may bring an action against the maker whom he has accommodated, although he paid without waiting for formal demand on the maker or notice of dishonor to himself.³⁷⁷ But an indorser who has been himself discharged by laches, and afterwards pays a bill or note, cannot sue another and prior indorser who has also been discharged,³⁷⁸ although the indorser who made payment did not know of the laches, by which he was discharged, at the time he made the payment.³⁷⁹ In like manner, if an indorser has been discharged, and afterwards voluntarily pays a note or bill, he cannot enforce a collateral security which

³⁷¹ Chit. Bills, 282; *Houle v. Baxter*, 3 East, 177; *Gillespie v. Campbell*, 39 Fed. 724. But see *Wiffen v. Roberts*, 1 Esp. 261; *Brown v. Maffey*, 15 East, 220.

³⁷² *Low v. Copestake*, 3 Car. & P. 300.

³⁷³ *Durham v. Giles*, 52 Me. 206.

³⁷⁴ *Day v. Humphrey*, 79 Ill. 452.

³⁷⁵ 2 Pars. Notes & B. 208; *Emerson v. Cutts*, 12 Mass. 78.

³⁷⁶ *Ellsworth v. Brewer*, 11 Pick. (Mass.) 316.

³⁷⁷ *Pinney v. McGregory*, 102 Mass. 186.

³⁷⁸ *Story, Bills*, § 423; *Turner v. Leech*, 4 Barn. & Ald. 451; *Roscow v. Hardy*, 12 East, 435.

³⁷⁹ Chit. Bills, 481; 2 Daniel, Neg. Inst. 253; *Wilson v. Ray*, 2 Perry & D. 253.

was given to him for his indemnity, such indemnity being only against the legal liability.³⁸⁰

Reissue by Indorser.

§ 1434. An indorser who pays a bill or note may reissue it, and such reissue will amount to a new note as to him,³⁸¹ and will also bind prior parties to the paper;³⁸² but one who indorses a note before its delivery to the payee, and pays it at maturity, thereby extinguishes the instrument, and he cannot afterwards reissue it so as to render the maker liable to his indorsee.³⁸³ If an indorser takes up a note after its dishonor, and subsequently delivers it, with a blank indorsement uncanceled, to the holder's agent for collection, it will not be a payment of the note, and will transfer the legal title as effectually as if the transfer had been made before maturity.³⁸⁴ But if the indorser takes up a note at maturity, and afterwards reissues it, an accommodation maker will be no longer liable.³⁸⁵ And a note paid by the last indorser is, properly speaking, no longer negotiable in his hands.³⁸⁶ The personal representative of an indorser, being in effect a trustee, can only take up a bill or note as such representative, with the same

³⁸⁰ 2 Daniel, Neg. Inst. 253; 2 Pars. Notes & B. 209; *Bachelor v. Priest*, 12 Pick. (Mass.) 399.

³⁸¹ 2 Edw. Bills & N. § 723; *Ward v. Allen*, 2 Metc. (Mass.) 53. And if he reissues the note with his indorsement uncanceled he will be liable without notice of fresh dishonor by the maker. *St. John v. Roberts*, 31 N. Y. 441.

³⁸² 2 Daniel, Neg. Inst. 265; 2 Edw. Bills & N. §§ 723, 727; e. g. as against maker, *Gomez Serra v. Berkley*, 1 Wills. 46; and the maker will remain liable to his indorsee, *Howell v. McCracken*, 87 N. C. 399; *Guild v. Eager*, 17 Mass. 615; *Woodman v. Boothby*, 66 Me. 389; *Kirksey v. Bates*, 1 Ala. 303. So, too, a prior indorser, although he originally held the note as indorsee of the payee for his own indemnity, as the payee's surety, and afterwards reindorsed it to the payee, who reissued it by indorsement to the plaintiff. *Emerson v. Cutts*, 12 Mass. 78. But where the maker has been discharged by a surrender to the payee of the original consideration, the payee only will be liable on the reissue of the note. *Kelly v. Staed*, 136 Mo. 430, 37 S. W. 1110.

³⁸³ *Pray v. Maine*, 7 Cush. (Mass.) 253.

³⁸⁴ *French v. Jarvis*, 29 Conn. 347.

³⁸⁵ *Blenn v. Lyford*, 70 Me. 149; *Pyper v. McKay*, 16 U. C. C. P. 67; *Gardner v. Maynard*, 7 Allen (Mass.) 456.

³⁸⁶ *Boylston v. Greene*, 8 Mass. 465; *Blake v. Sewell*, 3 Mass. 556. As regards subsequent indorsements, *Mead v. Small*, 2 Me. 207.

effect as an indorser, and not as an individual purchaser.³⁸⁷ But if, after the death of an indorser who has been discharged, the note is paid by his administrator, he can recover against the maker.³⁸⁸

In general, an indorser is entitled to be subrogated, like a surety, to any collateral security held for the payment of the note or bill.³⁸⁹ Thus, collateral deposited with a bank to secure the discount of a note will inure to the benefit of an accommodation indorser who pays it.³⁹⁰ But if the acceptor of a bill drawn or indorsed for his accommodation gives a deed of trust to indemnify the second and third indorsers, the first indorser can only be subrogated to their rights upon payment of the bill, and cannot, in the meantime, require them to sell and apply the trust property, or enjoin them in equity from collecting the bill.³⁹¹ And, in general, an indorser can neither be subrogated to collateral security until he has paid the bill, nor can he compel the holder to exhaust the collateral before proceeding on the bill.³⁹²

Payment by Principal—Surety.

§ 1435. If a bill or note is paid by the principal debtor, such payment will discharge the surety,³⁹³ unless the payment is itself afterwards declared void; e. g. because made in contemplation of bankruptcy.³⁹⁴ If the paper is paid by a guarantor, he will be entitled to an action against the maker or other party guarantied by him.³⁹⁵

³⁸⁷ 2 Daniel, Neg. Inst. 253; 2 Edw. Bills & N. § 727; *Burton v. Slaughter*, 26 Grat. (Va.) 914.

³⁸⁸ *Kennedy v. Carpenter*, 2 Whart. (Pa.) 344.

³⁸⁹ *National Exch. Bank v. Silliman*, 65 N. Y. 475; *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588; *O'Hara v. Haas*, 46 Miss. 374.

³⁹⁰ *Duncan v. Bank*, 6 App. Cas. 1; and will not be subject to defense as against a purchaser after maturity, *Arnot v. Woodburn*, 35 Mo. 99.

³⁹¹ *Dunlap v. Clements*, 7 Ala. 539.

³⁹² *First Nat. Bank v. Wood*, 71 N. Y. 405.

³⁹³ See §§ 941, 942, *supra*. So, payment by the party accommodated is equivalent to payment by the acceptor, and discharges the surety. *Benj. Chalm. Dig. art. 234*.

³⁹⁴ *Petty v. Cooke*, L. R. 6 Q. B. 790.

³⁹⁵ Such action accrues immediately after payment. *King v. Hannah*, 6 Ill. App. 495; although made without the knowledge of the principal, *Teberg v. Swenson*, 32 Kan. 224, 4 Pac. 83; and may be brought in his own name, *Bishop v. Rowe*, 71 Me. 263; or in that of the payee, *Granite Nat. Bank v.*

If payment is made by a surety, he is entitled to be exonerated by his principal;³⁹⁶ and, if he tenders payment, he is entitled to an assignment of the instrument from the holder, and will be discharged if such assignment is refused.³⁹⁷ But a tender by the surety after suit begun against the principal maker will only effect his discharge if indemnity against costs is provided.³⁹⁸ On the other hand, part payment made by a surety for his own release by the payee cannot be set up by the maker or inure to his benefit.³⁹⁹

Where a bill or note is paid by the surety, his action against the principal will be for money paid, and not on the paper itself.⁴⁰⁰ But the surety cannot recover against his principal until he has actually paid the bill.⁴⁰¹ Payment, however, by giving his own note, will support an action against the principal,⁴⁰² even though the note ac-

Fitch, 145 Mass. 567, 14 N. E. 650; or by continuing the holder's original action, *Fifth Nat. Bank v. Woolsey* (Sup.) 52 N. Y. Supp. 827. As to action by a guarantor against his principal, see § 862, *supra*.

³⁹⁶ See §§ 978-981, *supra*. So, payment by the surety's agent. *Low v. Blodgett*, 21 N. H. 121.

³⁹⁷ *Merriken v. Godwin*, 2 Del. Ch. 236.

³⁹⁸ *Hampshire Manufacturers' Bank v. Billings*, 17 Pick. (Mass.) 87.

³⁹⁹ *Gilstrap v. Smith* (Ga.) 28 S. E. 608.

⁴⁰⁰ *Frevort v. Henry*, 14 Nev. 191. So, too, where the surety's name was used as payee and indorser instead of a principal, who was not a party to the paper, *Abraham v. Mitchell*, 112 Pa. St. 232, 3 Atl. 830. But see, *contra*, where he is a party, *Tutt v. Thornton*, 57 Tex. 35; although he need not have possession of the note, *Saunders v. Ireland*, 87 Tex. 316, 28 S. W. 271.

⁴⁰¹ And his discharge on a ca. sa. against him will not be sufficient. *Powell v. Smith*, 8 Johns. (N. Y.) 192. But if A. agrees to pay C.'s note, in consideration of the indebtedness of A. to B. and B. to C., C. may sue A. for non-performance, whether C. has paid the note or not. *Sapp v. Faircloth*, 70 Ga. 660. So, if C., as surety, become liable by drawing on his principal, A., and the draft is not accepted or paid by A. *Sapp v. Aiken*, 68 Iowa, 690, 28 N. W. 24.

⁴⁰² *Doolittle v. Dwight*, 2 Metc. (Mass.) 561; *Keough v. McNitt*, 6 Minn. 513 (Gil. 357); *Rizer v. Callen*, 27 Kan. 339. But see *Wright v. Lawton*, 37 Conn. 167. And such payment by note will support an action for contribution against a co-surety. *Prescott v. Newell*, 39 Vt. 82. But if the surety gives his individual note, knowing the original contract to be usurious, it will not be a payment which will deprive the principal of such defense. *Mims v. McDowell*, 4 Ga. 182. And a surety cannot recover usurious interest voluntarily and knowingly paid by him. *Lucking v. Gegg*, 12 Bush (Ky.) 298.

cepted by the creditor in payment was not stamped or collectible.⁴⁰³ So, if his note has been received in satisfaction of a judgment upon the original note against the principal, although the judgment has not been satisfied of record.⁴⁰⁴

Even where the payment by the surety has been made in Confederate currency, he may recover against the principal the value of the currency at the time of payment.⁴⁰⁵ But if the surety pays in depreciated bank notes, furnished by the principal himself, the payment will inure to the principal's benefit, and discharge him from further liability.⁴⁰⁶ And if the original principal, by a subsequent agreement with the surety, changes places with him, and becomes himself the surety, and afterwards pays the note as such, it will amount to a purchase of the note, and not a payment, and will entitle him to the security of a collateral mortgage made by the original surety to the holder, even as against subsequent mortgagees.⁴⁰⁷ So, if a surety purchases a note on which he is liable, with the expectation of buying out and controlling the corporation by which the note was made, it will not amount to a payment of the note, although he afterwards gives up the plan.⁴⁰⁸

§ 1436. — If a surety pays a bill or note, he may afterwards re-issue it;⁴⁰⁹ but he cannot thereby render other parties liable on it to the purchaser.⁴¹⁰ Payment by the surety entitles him to be subrogated to the collateral securities.⁴¹¹ But if he has become in effect the principal by purchasing the land covered by a collateral mortgage and assuming the mortgage, and taking security for the amount due on it, over and above the consideration for the land (the mortgage cov-

⁴⁰³ *Hardin v. Branner*, 25 Iowa, 364.

⁴⁰⁴ *Witherby v. Mann*, 11 Johns. (N. Y.) 518.

⁴⁰⁵ *Butler v. Butler*, 8 W. Va. 674.

⁴⁰⁶ *Kirtland v. Railroad Co.*, 4 Lea (Tenn.) 414. And a payment with money borrowed by the principal on his note with a surety, which is afterwards paid by the surety, is a payment by the principal, and not by the surety. *Gerdone v. Gerdone*, 70 Ind. 62.

⁴⁰⁷ *Fields v. Sherrill*, 18 Kan. 365.

⁴⁰⁸ *Ex parte Balch*, 2 Low, 440, Fed. Cas. No. 739.

⁴⁰⁹ Although he is one of the makers. *Wilkinson v. Daniels*, 1 G. Greene (Iowa) 179.

⁴¹⁰ *Hopkins v. Farwell*, 32 N. H. 425.

⁴¹¹ See §§ 982-985, *supra*.

ering other land also), he will not be entitled to subrogation to the mortgage against the rest of the property upon payment of the mortgage note which he has assumed.⁴¹² On the other hand, if the owner of mortgaged premises pays off notes secured by the mortgage for his own security, he will be held to have done so as a purchaser, without discharging the maker of the notes, and can proceed against the maker on the note without first foreclosing the mortgage.⁴¹³

If one of several sureties pays a bill or note, he is entitled to contribution from his co-sureties.⁴¹⁴ But the payment by a surety in general extinguishes the note, and the action for contribution will not be on the note, but on an implied assumpsit,⁴¹⁵ although it has been held that if one of the makers of a joint and several note, who is in reality a surety for the other, pays the note, it will not operate as a payment unless so intended, and an action may be brought for his benefit on the note in the name of the payee.⁴¹⁶ But if B. and C., two of the makers of a joint note which is signed "A., B., C., Surety," each pay one-half of the note, and B. is, in fact, also a surety for A., in an action against him by the surety C., he may prove his character as a surety for A. as a defense against further liability to C.⁴¹⁷ And where one surety signs as a co-maker, and the other as an accommodation indorser for the same maker, the former cannot claim contribution against the latter as a co-surety.⁴¹⁸

Payment Supra Protest.

§ 1437. Where payment is made for the honor of another party, according to the law merchant, the person making such payment has his action against the party honored,⁴¹⁹ and takes the bill as through an indorsement from such party, with all rights and remedies belong-

⁴¹² *Rugg v. Brainerd*, 57 Vt. 364.

⁴¹³ *Allen v. Dermott*, 80 Mo. 56.

⁴¹⁴ See §§ 971-978, *supra*.

⁴¹⁵ *Holliman v. Rogers*, 6 Tex. 91.

⁴¹⁶ *Rockingham Bank v. Claggett*, 29 N. H. 292.

⁴¹⁷ *Slason v. Barrett*, 2 N. Y. 406.

⁴¹⁸ *Smith v. Smith*, 16 N. C. 173; *Dawson v. Pettway*, 20 N. C. 396.

⁴¹⁹ See §§ 1194, 1195, *supra*. But it has been held that recovery in such case should be on the common counts, and not on the bill itself. *Bachus v. Richmond*, 5 Yerg. (Tenn.) 109.

ing to him.⁴²⁰ Thus, if he pays for the honor of an indorser, he has the rights of a purchaser by indorsement from him.⁴²¹ So, if one accepts a bill for the honor of an indorser at the request of the drawer, and afterwards pays it, he may recover against the indorser honored.⁴²² But if a stranger pays a note for the indorser's honor as a volunteer, without the indorser's request, he will thereby get no rights against prior parties to the note.⁴²³

One who pays a bill for the honor of the indorser may bring his action against the drawer as a purchaser for value.⁴²⁴ So, if a bill is paid for the honor of an accommodation drawer, the payor may have his action against the acceptor for whose accommodation the bill was drawn, only parties subsequent to the party honored being discharged by the payment.⁴²⁵ And it seems that, where a bill is paid for the honor of an acceptor, his estate will be liable to the party paying, even though there has been no formal protest of the bill, or statement of its payment *supra* protest.⁴²⁶ The payment of a bill *supra* protest is in effect a purchase of the bill, and entitles the party paying to recover the damages provided by statute upon dishonor.⁴²⁷ But, in general, an indorser is not liable to one who pays a bill or note for his honor without notice of such payment.⁴²⁸ And where a bill is drawn by an agent, and paid for the honor of the principal, who is not named on its face, he cannot be held liable for such payment without formal notice.⁴²⁹

Payment by Stranger.

§ 1438. If a bill or note is paid, after its maturity, by a stranger to the paper, it will, in general, be held to be a purchase, and not a payment of the instrument.⁴³⁰ Whether it is a payment or a pur-

⁴²⁰ *Mertens v. Winnington*, 1 Esp. 113.

⁴²¹ *Goodall v. Polhill*, 1 C. B. 233.

⁴²² *Konig v. Bayard*, 1 Pet. 250.

⁴²³ *Smith v. Sawyer*, 55 Me. 139.

⁴²⁴ *Mertens v. Winnington*, 1 Esp. 112.

⁴²⁵ *Ex parte Swan*, L. R. 6 Eq. 344.

⁴²⁶ *Ex parte Wyld*, 2 De Gex, F. & J. 642.

⁴²⁷ *Pratalongo v. Larco*, 47 Cal. 378.

⁴²⁸ *Wood v. Pugh*, 7 Ohio, 156.

⁴²⁹ *Grosvenor v. Stone*, 8 Pick. (Mass.) 79.

⁴³⁰ *Thomas v. Fenton*, 5 Dowl. & L. 28; *McDonnell v. Burns*, 28 C. C. A.

chase is, however, a question of fact.⁴³¹ If one who is not a party to the bill takes it up, and makes payment to the banking house where it is payable, the payment will not be presumed to have been made in behalf of the acceptor.⁴³² And even where part payments have been previously made, after maturity, by the drawer and acceptor, and the bill is subsequently paid by a stranger, and the payment receipted in general terms on the bill, it will not be conclusive evidence of an intention to pay the bill, but a contrary intention may be shown by parol, and the party paying may recover, as a purchaser, the balance due from the drawer.⁴³³

If a note in the hands of the administrator of the last holder is duly accounted for by him as so much cash, it will amount to a transfer of the note to him individually by operation of law.⁴³⁴ And a note may be purchased from the payee by the maker's firm, and held by the firm as a set-off against a debt due from the payee.⁴³⁵ And even where a note is taken up with money loaned to the maker for the purpose by his father, the jury may find such transaction to be a purchase rather than a payment, where the note was not canceled by the maker, but was delivered by him to his father, and remained in his father's possession at his death.⁴³⁶ But where a note is paid by the maker's son, and is given up to him, and is understood by the holder to be a payment, it has been held to be such in a subsequent action brought by the son's firm against a surety on the note.⁴³⁷ So, where a note is paid by the maker's bail, it has been held to be a payment, and not a purchase, although the payor took an instrument reciting his purchase,

174, 83 Fed. 866 (as against later notes secured by the same collateral); especially if made without intending to satisfy the note, *Dodge v. Trust Co.*, 93 U. S. 379; and paid by the stranger with his own money, *Swope v. Leffingwell*, 72 Mo. 348; although not understood to be a purchase at the time, *Barney v. Clark*, 46 N. H. 514. So, a fortiori, if paid on an express agreement for transfer of the note. *Casco Nat. Bank v. Shaw*, 79 Me. 376, 10 Atl. 67.

⁴³¹ *Willcoxon v. Logan*, 91 N. C. 449; *Swope v. Leffingwell*, supra.

⁴³² *Byles, Bills*, 226; *Deacon v. Stodhart*, 2 Man. & G. 317; *Jones v. Broadhurst*, 9 C. B. 173.

⁴³³ *Graves v. Key*, 3 Barn. & Adol. 313.

⁴³⁴ *Smith v. Gregory*, 75 Mo. 121.

⁴³⁵ *Hall v. Kimball*, 77 Ill. 161.

⁴³⁶ *Dougherty v. Deeney*, 45 Iowa, 443.

⁴³⁷ *Brem v. Allison*, 68 N. C. 412.

and assigning the note with power to bring suit on it in the name of the holder who received payment.⁴³⁸ So, it has been held that, where a stranger pays a note at maturity, it will be presumed to be an extinguishment of the note, and not to carry any right of subrogation to the party paying,⁴³⁹ although he may have declined to have the note canceled.⁴⁴⁰ And this is true where the note was surrendered at the time, but not indorsed by the holder, although the party paying, after suit commenced against the makers, procured from the holder a power to bring such suit.⁴⁴¹

§ 1439. — A mere volunteer paying a note is not a purchaser, and has no right to be subrogated to the rights of the holder, the circumstances under which he makes the payment being a question of fact for the jury to determine.⁴⁴² So, a stranger cannot offer payment of a note, and insist upon its surrender to him with the collateral that secures it uncanceled.⁴⁴³

But if a bill or note is paid by one who is not a party to it, it will be presumed to have been done with the consent of the principal debtor, who should have made payment.⁴⁴⁴ And where, after taking up a note, such payor receives payment of installments of principal and interest from the maker, it will be presumed that he is a purchaser, and did not pay the note for the maker.⁴⁴⁵ The intention of a stranger to become a purchaser may be shown by him.⁴⁴⁶ And in such a transaction the intention of the parties governs; and although the stranger

⁴³⁸ *Hull v. Pitfield*, 1 Wils. 46.

⁴³⁹ Especially where the payor was the maker's employer, and the payment was probably made for the maker. *Oliver v. Bragg*, 15 La. Ann. 402.

⁴⁴⁰ *Burr v. Smith*, 21 Barb. (N. Y.) 262.

⁴⁴¹ *Merrimack Bank v. Parker*, 7 Pick. (Mass.) 88.

⁴⁴² *Moran v. Abbey*, 58 Cal. 163. And this has been held irrespective of the maker's request and of any agreement with the maker. *Binford v. Adams*, 104 Ind. 41, 3 N. E. 753.

⁴⁴³ *Williams v. Gottschalk*, 6 Mo. App. 597. So, where a note was payable "on or before May 1," and the holder refused to sell it, although he took the money offered by a party who was liable for the maker, and claimed the right, saying the interest would stop, and although the money was furnished for investment by a third party. *Wells v. Tucker*, 57 Vt. 223.

⁴⁴⁴ *Byles, Bills*, 225; *Cook v. Lister*, 32 Law J. C. P. 121. But this may be rebutted. *Walter v. James*, L. R. 6 Exch. 124.

⁴⁴⁵ *Rand v. Barrett*, 66 Iowa, 731, 24 N. W. 530.

⁴⁴⁶ *Byles, Bills*, 226, note; 2 Daniel, Neg. Inst. 253.

takes up the note for the maker, and at his request, both the note and a collateral mortgage securing it may be kept alive in his hands.⁴⁴⁷ So, where he is requested by the maker, and also by the indorsers, to take up the note and hold it as his security, and the indorsers authorize the bank to deliver the note to him without erasing their signatures, he can hold it as a purchaser against both maker and indorsers.⁴⁴⁸ On the other hand, payment by a stranger to a collecting agent at the maker's request has been held to extinguish the note, although it was subsequently transferred by the payee to the party who paid it.⁴⁴⁹ So, where a stranger pays a note at the request of the maker, after it is due, and it is charged to his account, and sent to him as a voucher, it will amount to a payment as to sureties who did not consent.⁴⁵⁰ And if a stranger takes up a bill for an indorser, at his request and without the knowledge of the acceptor, it has been held that he can only recover against the acceptor on the acceptance.⁴⁵¹

§ 1440. — The payment of a bill by a stranger may be a purchase, although not so understood at the time by the holder, who supposed it to be made on behalf of the acceptor.⁴⁵² But if money is borrowed from another by the maker, and the note paid with it, it will be a payment and discharge the sureties, although the lender of the money took the note without the knowledge of the holder or sureties.⁴⁵³ On

⁴⁴⁷ *Ramsey v. Daniels*, 1 Mackey (D. C.) 16; *Dillon v. Kauffman*, 58 Tex. 666. And such payor may recover from the maker the face of the note, although he paid less. *Boyce v. Shiver*, 3 S. C. 515.

⁴⁴⁸ *Hartshorn v. Brace*, 25 Barb. (N. Y.) 126. And one who is induced to pay a draft by the fraudulent representations of the drawer may sue the drawer as a purchaser. *Goldsmid v. Bank*, 12 Barb. (N. Y.) 407.

⁴⁴⁹ *Moran v. Abbey*, 63 Cal. 56. So, where he is acting as the maker's agent. *Johnson v. Glover*, 121 Ill. 283, 12 N. E. 257.

⁴⁵⁰ *Coykendall v. Constable*, 19 Wkly. Dig. 169.

⁴⁵¹ *Houle v. Baxter*, 3 East, 177. And in this case the acceptance was barred by a discharge in bankruptcy.

⁴⁵² And the purchaser may sue the drawer upon it, *Benj. Chalm. Dig. art. 234*; *Lyon v. Maxwell*, 18 Law T. (N. S.) 28; the purchaser being, in this case, the assignee of the acceptor. But a stranger who pays coupons without the holder's knowledge, to save the credit of the company, cannot set up that it was a purchase as against a subsequent bona fide holder of the bonds. *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed. 881.

⁴⁵³ *Eastman v. Plumer*, 32 N. H. 238. So, where the maker pays the first of several notes secured by a mortgage, and transfers it to the person

the other hand, where a note is taken up with money borrowed by the original lender or holder of the note, it will not discharge another note held with it as collateral.⁴⁵⁴ Where one advances money at the maker's request to pay a note, under an agreement that he shall hold it, he may bring an action on it as a purchaser against the maker and indorsers.⁴⁵⁵

But if a note is given for land, and is secured by a mortgage on the land, and the maker of the note afterwards sells the land subject to the mortgage, it will be satisfied as to the maker if a subsequent mortgagee of the same land purchases it and the mortgage, although he takes an assignment of both.⁴⁵⁶ So, if notes are secured by a mortgage, and two of them are transferred "without recourse" to A., and by him assigned to B., and taken up afterwards by A., in a subsequent transfer of the mortgaged land to him, to pay for the land, it will be a payment, and not a purchase of the notes.⁴⁵⁷ So, if a note is paid by one who agreed to pay it as purchaser of the land covered by a collateral mortgage, it will be a payment, and cannot be reissued by the party who paid it, although it was taken and not marked "Paid," and was afterwards transferred by him as collateral to another, the land having been afterwards sold by him to a third party with the representation that the note was paid.⁴⁵⁸ So, if a note is paid by one who is under an obligation to pay it, e. g. an expressman who had previously received money for that purpose, or if it is paid for him by another at his request, it will give the latter no right of action against the maker.⁴⁵⁹

lending him money for the purpose, it is a payment, and not a purchase, and lets in other notes secured by the mortgage as entitled to priority in payment out of the mortgage. *Bailey v. Malvin*, 53 Iowa, 371, 5 N. W. 515.

⁴⁵⁴ *Smith v. Johnson*, 2 Cranch, C. C. 645, Fed. Cas. No. 13,067.

⁴⁵⁵ *Horton v. Manning*, 37 Tex. 23.

⁴⁵⁶ *Rolfe v. Wooster*, 58 N. H. 526. And see *Lemans v. Wiley*, 92 Ind. 436, where a widow, holding land through her husband, paid off the note and mortgage for the purchase money, expecting reimbursement from the husband's estate.

⁴⁵⁷ So held on subsequent foreclosure of the mortgage. *Gammon v. Kentner*, 55 Iowa, 508, 8 N. W. 348.

⁴⁵⁸ And the purchaser of the land may set up the payment at suit of the pledgee. *Citizens' Bank v. Lay*, 80 Va. 436.

⁴⁵⁹ *Willis v. Hobson*, 37 Me. 403.

So, if one who has assumed the payment of a note under an agreement with the maker pays it, it will discharge the maker.⁴⁶⁰ And although the agreement was that he should take it up and hold it, it will discharge both the note and a collateral trust deed, where the money was advanced by check to the maker, and deposited by him, and the note paid by his own check.⁴⁶¹ So, where money is advanced to the maker to pay notes, on a contract for the purchase of land covered by a collateral mortgage, the payment being made on certain conditions, it is a payment, and not a purchase, although the contract for purchasing the land is afterwards abandoned.⁴⁶²

But where a note secured by a mortgage is taken up by a bank holding it, for a party who had assumed to pay it, and the bank takes the note and mortgage with additional collateral, it is a purchase, and not a payment.⁴⁶³ So, where notes secured by mortgage are taken up by an accepted draft with an express agreement that the acceptor be subrogated to the mortgage.⁴⁶⁴ So, where a note is paid by the bank where it was payable, by mistake, for a note of the maker's firm, instead of his individual note, and notice of dishonor is given immediately on discovery of the mistake, before the close of banking hours.⁴⁶⁵ So, where a bank discounts, and afterwards pays, a note, it will hold it as a bona fide purchaser.⁴⁶⁶ So, if a bill is accepted for the drawer's accommodation, and, on being sent for collection to the bank, is credited to the holder, the bank will be a purchaser,

⁴⁶⁰ *Ellis v. Allen*, 48 Vt. 545. But the payor is entitled to hold the note as evidence and for his own protection. *Stiger v. Bent*, 111 Ill. 323.

⁴⁶¹ *Dooley v. Insurance Co.*, 3 Hughes, 221, Fed. Cas. No. 3,900.

⁴⁶² *Blissell v. Lewis*, 56 Iowa, 231, 9 N. W. 177.

⁴⁶³ *Swope v. Leffingwell*, 72 Mo. 348.

⁴⁶⁴ Although the holder indorsed, "Received payment as stated." *Levy v. Baer*, 19 La. Ann. 408.

⁴⁶⁵ *Irving Bank v. Wetherald*, 36 N. Y. 335. 34 Barb. (N. Y.) 323. So, where the bank at which the note was payable paid it, and charged it to the maker, whose account was insufficient, it is a purchase, and it may bring its action against the maker, although the note was placed on a canceling fork, as evidence that it was charged, and though it was made for accommodation of an indorser, who was cashier of the bank. *Watervliet Bank v. White*, 1 Denio (N. Y.) 608. So, where a check drawn on a branch bank at A. is paid by another branch bank at B., and is dishonored on its presentment at A., the bank at B. will hold it as a purchaser. *Woodland v. Fear*, 7 El. & Bl. 519.

⁴⁶⁶ *Roberts v. Lane*, 64 Me. 108.

and can hold the acceptor as such, although the drawer who was accommodated was the president of the bank.⁴⁶⁷

Place of Payment—As Agent.

§ 1441. Where a depositor makes an acceptance specially payable at a bank, he thereby authorizes the bank to pay the bill.⁴⁶⁸ But if an acceptance, made payable at a particular bank, is revoked by the acceptor before payment, although after the bank has received the bill and formally canceled the acceptance, the bank may afterwards return it to the holder on the same day, with the acceptance restored as canceled by mistake.⁴⁶⁹ If a bill or note is made negotiable at a particular bank, it amounts to an authority to the bank to pay it.⁴⁷⁰ So, where a note is made payable at a bank, it amounts to a direction from the maker to the bank to pay it.⁴⁷¹ In Illinois, however, and in Tennessee, this does not authorize the bank to apply the maker's deposit to the payment without an express direction from him.⁴⁷² But in Virginia the deposit of an insolvent maker may be applied by the bank to pay such a note.⁴⁷³ Although a general deposit may be so applied, the bank is not required to make such application, but it may

⁴⁶⁷ *Pacific Bank v. Mitchell*, 9 Metc. (Mass.) 297.

⁴⁶⁸ Although his deposit was less than the acceptance, and the acceptance was countermanded after payment. *Kymer v. Laurie*, 18 Law J. Q. B. 218. But the bank's remedy is confined to an action against such acceptor, and he cannot hold the drawer on his verbal promise to the acceptor to accept a counter draft on himself. *Bay City Bank v. Lindsay*, 94 Mich. 176, 54 N. W. 42. As to application of deposits in the hands of the holder, where the paper is not expressly so payable, see § 1393, *supra*.

⁴⁶⁹ *Warwick v. Rogers*, 5 Man. & G. 340, 6 Scott N. R. 1.

⁴⁷⁰ *Mandeville v. Bank*, 9 Cranch, 9; *Kuapp v. Cowell*, 77 Iowa, 528, 42 N. W. 434; *Bedford Bank v. Acoam*, 125 Ind. 584, 25 N. E. 713. And see § 125, *supra*.

⁴⁷¹ *Commercial Nat. Bank v. Henninger*, 105 Pa. St. 496. And it may hold it against the maker as a purchaser. *Union Bank v. Griffin*, 4 N. Y. Leg. Obs. 344. And the bank may pay such note, although it had been directed to pay a check (not yet presented) which would have exhausted the maker's deposit. *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82. Such note is in effect a check. *Indig v. Bank*, 80 N. Y. 100.

⁴⁷² *Ridgely Nat. Bank v. Patton*, 109 Ill. 479; *Wood v. Trust Co.*, 41 Ill. 267; *Grissom v. Bank*, 87 Tenn. 350, 10 S. W. 774.

⁴⁷³ *Ford's Adm'r v. Thornton*, 3 Leigh, 695.

set off a judgment rendered on the note in an action brought for the deposit.⁴⁷⁴ If money is paid by the acceptors to their bankers to take up the bill, and it is nevertheless dishonored by the bankers and taken up by the drawer, he does not thereby get a right of action against the bankers, but they are liable to the acceptors only.⁴⁷⁵ Making a note payable at a bank does not make the bank the agent of the maker, so as to render it liable to his assignee for not paying the note,⁴⁷⁶ nor to the holder.⁴⁷⁷ But its failure to make such application, where the fund is sufficient at the maturity of the paper, and remains so until action brought, will discharge the indorser.⁴⁷⁸ And the fact that the note of a depositor is held by the bank before its maturity does not give the bank a lien on the maker's deposit.⁴⁷⁹ A mercantile partnership is not authorized to apply the general deposit of a customer to the payment of his notes.⁴⁸⁰ And a bank cannot, in general, apply the deposit of an indorser to the payment of a note payable at the bank.⁴⁸¹ But if a note is discounted by a bank for one of its depositors, his deposits at the maturity of the note, and afterwards, are liable for its payment.⁴⁸²

Funds Provided and Lost.

§ 1442. The fact that a maker has funds, at the maturity of a note, at the bank named in it as the place of payment, does not

⁴⁷⁴ *Marsh v. Bank*, 34 Barb. (N. Y.) 298.

⁴⁷⁵ *Hill v. Royds*, L. R. 8 Eq. 290.

⁴⁷⁶ *Smith v. Bank*, 22 Barb. (N. Y.) 627.

⁴⁷⁷ *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 490, 20 S. W. 406. In this case the deposit was made after the note matured, and was less than its full amount.

⁴⁷⁸ *Central Bank v. Thein*, 76 Hun (N. Y.) 571, 28 N. Y. Supp. 232; *German Nat. Bank v. Foreman*, 138 Pa. St. 474, 21 Atl. 20.

⁴⁷⁹ *State Sav. Ass'n v. Boatmen's Sav. Bank*, 11 Mo. App. 292. It cannot retain the deposit to meet a note not yet matured, although it has guaranteed its payment. *Commercial Nat. Bank v. Proctor*, 98 Ill. 558. Nor can it apply a deposit made after the dishonor of the paper. *Gordon v. Muchler*, 34 La. Ann. 604; *Steiner v. Loan Co.*, 98 Pa. St. 591; *First Nat. Bank v. Peltz*, 176 Pa. St. 513, 35 Atl. 218.

⁴⁸⁰ *Vance v. Gelb*, 27 Tex. 272.

⁴⁸¹ *Mechanics' & Traders' Bank v. Seltz*, 150 Pa. St. 632, 24 Atl. 356; even though the indorser is the principal debtor, *First Nat. Bank v. Peltz*, 176 Pa. St. 513, 35 Atl. 218.

⁴⁸² *Muench v. Bank*, 11 Mo. App. 144.

make the bank the agent of the holder in any way; and, if the bank fails before the note is presented, the maker will not be discharged by the fact that the holder did not present the instrument at maturity for payment, and that it would have been paid, if presented at that time.⁴⁸³ So, if the drawer of a bill makes a deposit with his banker, on whom it was drawn, for the payment of the bill, and the drawee fails to pay it, the loss will fall on the drawer, and not on the holder.⁴⁸⁴ So, if the maker sends money to the bank where his note is payable, and withdraws it after maturity (the note not having been then presented), it will not be a valid payment or tender of payment, although it might have been a good tender, if continued in the hands of the bank.⁴⁸⁵ So, if a mortgagor notifies the mortgagee that the money is waiting at a certain bank to pay the mortgage, and the bank fails before demand is made, it will not amount to a payment.⁴⁸⁶ And even where the maker sends funds to the place of payment to take up a note, and the note is indorsed by the holder to the bank for collection, the bank will be regarded as the maker's agent, and, if it fails before the note is paid, the maker will be still liable.⁴⁸⁷ So, if a bank at A. holds a note which is payable at B., at a place not particularly designated, and money is left by the maker with an agent at B., and is afterwards stolen, and not applied to the note, it will not make such agent the holder's agent, or amount to a payment of the note, or stop the running of interest on it.⁴⁸⁸ But if a note for goods purchased is made payable at a bank, and it is provided that the sale shall be forfeited if the note is not paid at maturity, the makers will not be subjected to such forfeiture until the note is formally presented at the bank.⁴⁸⁹

§ 1443. — If money is given by the maker of a note to his agent for the purpose of taking it up, and is tendered to the holder on his surrender of the note, and the note is mislaid, and not found

⁴⁸³ *Adams v. Improvement Commission*, 44 N. J. Law, 638. But see, contra, *Lazier v. Horan*, 55 Iowa, 75, 7 N. W. 457.

⁴⁸⁴ *Moore v. Meyer*, 57 Ala. 20.

⁴⁸⁵ *Hills v. Place*, 48 N. Y. 520.

⁴⁸⁶ *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. 39.

⁴⁸⁷ *Sutherland v. Bank*, 31 Mich. 230.

⁴⁸⁸ *First Nat. Bank v. Free*, 67 Iowa, 11, 24 N. W. 566.

⁴⁸⁹ *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378.

by the holder until the agent has failed, with the maker's money in his hands, it will not amount to a payment, but will be a sufficient tender to stop the running of interest.⁴⁰⁰ But if money is sent by the maker to his agent, and the agent persuades the holder to take his note in settlement, it will be a payment, and release the maker.⁴⁰¹ So, if a note is taken and held by an agent for his principal, and is afterwards paid by him to his principal, it will be a payment, and not a purchase by the agent.⁴⁰² So, where a check belonging to the government is paid by a collector to the treasurer by a bank certificate of deposit, which was duly paid, it will be a payment of the check, although the check itself (which had been discounted by the bank) was dishonored and taken up by the collector, and surrendered to the drawer of the check for a note made by him. And the latter instrument cannot be treated as a preferred debt due the government, although the original check was taken up by the collector with other funds belonging to the government.⁴⁰³ If a note is taken up by the maker's agent with the proceeds of goods belonging to the maker, it is paid, and cannot afterwards be transferred or pledged by the agent.⁴⁰⁴ So, if bank bills are purchased by an agent for the bank that issued them, they are thereby extinguished, although still in the agent's hands as vouchers; and they cannot, therefore, be attached as the property of the bank.⁴⁰⁵

⁴⁰⁰ *Dent v. Dunn*, 3 Camp. 296.

⁴⁰¹ *Baker v. Gavitt*, 128 Mass. 93.

⁴⁰² *Brice v. Watkins*, 30 La. Ann. 21.

⁴⁰³ *U. S. v. Thompson*, 33 Md. 575.

⁴⁰⁴ *Halsey v. Lange*, 28 La. Ann. 248.

⁴⁰⁵ *Wildes v. Bank*, 20 Pick. (Mass.) 352.

CHAPTER XL.

PAYMENT.

- I. TO WHOM MADE.
- II. WHEN MADE AND HOW PROVED.
- III. RECOVERY OF PAYMENT.
- IV. APPROPRIATION OF PAYMENT.

I. PAYMENT—TO WHOM MADE.

- § 1444. Payment To Rightful Holder.
- 1445. — To Designated Payee.
- 1446. — To Joint Payees.
- 1447. — To Persons under Disability.
- 1448. — To Executor.
- 1449. — To Trustee.
- 1450. — To Agent.
- 1451. Implied Agency.
- 1452. Ratification and Revocation of Agency.
- 1453. Crossed Checks.
- 1454. Payment to Agent in Notes.
- 1455. — In Bank Notes.
- 1456. — By Check.
- 1457. Default of Subagents.
- 1459. Duty of Collecting Agent.
- 1460. — Presentment and Notice by Agent.
- 1461. — Notice by Agent—Damages.
- 1462. Payment to Payee after Indorsement.
- 1465. — To Pledgor—Pledgee.
- 1466. — To Attaching Creditor.
- 1467. — To Indorsee.
- 1468. — Under Forged Indorsement.

Payment to Rightful Holder.

§ 1444. The payment of the bill or note must be made to the rightful holder or to his authorized agent.¹ And, if made to a

¹ 2 Edw. Bills & N. § 730; Story, Bills, § 413; Story, Prom. Notes, § 375. But it is sufficient to aver that the bill was paid "according to the custom of merchants." Cox v. Earle, 3 Barn. & Ald. 430.

wrongful holder before maturity, it will be at the risk of the party making it.² And, in general, a payment is valid, as against other parties, only when made in good faith and in ignorance of all facts which impair the holder's title.³ Thus, if it is paid to the original holder, who had transferred the note and obtained it again by fraud, which was known to the payor, it will not be sufficient.⁴ If, however, payment is made to one who holds under a blank indorsement, his possession will be presumptive evidence of his title and right to receive the money.⁵ Any one in possession is entitled *prima facie* to receive payment of a note payable to bearer,⁶ or to "A. or bearer."⁷

If it is so payable, even a payment, made in good faith, to a thief or finder, who is in actual possession, will be good.⁸ So, too,

² Benj. Chalm. Dig. art. 236; Chit. Bills, 446; 2 Daniel, Neg. Inst. 263; 2 Pars. Notes & B. 211; Story, Bills, § 416.

³ Benj. Chalm. Dig. art. 236; Story, Bills, § 450. The authority of a stranger to receive payment must be shown by the party alleging it. *South Branch Lumber Co. v. Littlejohn*, 31 Neb. 606, 48 N. W. 476; *Richards v. Waller*, 49 Neb. 639, 68 N. W. 1053; *Bank of University v. Tuck* (Ga.) 28 S. E. 168. But good faith is not sufficient, of itself, to make good a payment to the wrong holder. 2 Daniel, Neg. Inst. 254, 261.

⁴ *Pfau v. Biertenberger*, 13 Mo. App. 595; but a subsequent bona fide pledgee will be protected.

⁵ Byles, Bills, 223; Benj. Chalm. Dig. art. 236; Chit. Bills, 445; 2 Edw. Bills & N. § 730; Story, Bills, § 415; *Owen v. Barrow*, 1 Bos. & P. (N. S.) 101; *Davis v. Association*, 20 La. Ann. 24; *Dorr v. Jouet*, Id. 27; although the holder is merely an attorney for the indorser, *Ellsworth v. Fogg*, 35 Vt. 355. And see § 1078, *supra*.

⁶ Although he is known to be a holder for another, *Cone v. Brown*, 15 Rich. (S. C.) 262; or though he had pledged it to another (not in possession) as collateral, *Greer v. Woolfolk*, 60 Ga. 623; or although he held it to collect, and had a private agreement, unknown to the maker, to surrender it, on the death of the original holder, to her executor, *Lamb v. Matthews*, 41 Vt. 42.

⁷ *Greve v. Schweitzer*, 36 Wis. 554. So, too, a county order, *Sweet v. Commissioners*, 16 Minn. 106 (Gil. 96); or a sealed note, *Merritt v. Cole*, 9 Hun, 98, 14 Hun, 324. But the payment is not good, if the maker knew that the "bearer" had no authority from the true owner to receive payment. *Chapleear v. Martin*, 45 Ohio St. 126, 12 N. E. 448.

⁸ Byles, Bills, 223; Benj. Chalm. Dig. art. 236; Chit. Bills, 446; 2 Daniel, Neg. Inst. 258; 2 Pars. Notes & B. 212; *Smith v. Sheppard*, Sel. Cas. Ch. 243; or to a fraudulent holder, *Alexander v. Rollins*, 14 Mo. App. 109.

a payment made to a bona fide purchaser from such thief or finder, although made by the acceptor or maker with knowledge of the original loss of the instrument.⁹ But a payment made through negligence to one who is neither the rightful holder nor a bona fide purchaser before maturity, after notice of loss, will not be sufficient.¹⁰ And it has been held that payment made to the bearer of an instrument, which is so payable, will not be sufficient, if made under suspicious circumstances and incautiously; e. g. where the bill has been pieced together and is badly soiled.¹¹

Payment to Designated Payee.

§ 1445. If the paper is payable to a person named, without words of transfer, it should be paid to such payee.¹² And it cannot be shown by parol evidence that the parties agreed, at the time of making the note, that it should be paid to another person.¹³ It may be paid to the payee, who is named, although he is described as an official or agent.¹⁴ But, where a note is payable in Indiana

⁹ Chit. Bills, 446; 2 Edw. Bills & N. § 731; Story, Bills, § 416; Bevan v. Hill, 2 Camp. 381; Pierson v. Hutchinson, Id. 211, 6 Esp. 126.

¹⁰ Chit. Bills, 446; 2 Edw. Bills & N. § 731; 2 Pars. Notes & B. 212; Lovell v. Martin, 4 Taunt. 799. So, where the payment was made after maturity. Balnbridge v. City of Louisville, 83 Ky. 285; Hinckley v. Railroad Co., 129 Mass. 52; Coffman v. Bank, 41 Miss. 212.

¹¹ Byles, Bills, 224; 2 Pars. Notes & B. 213; Scholey v. Ramsbottom, 2 Camp. 485. And the negligence or suspicion must not be such as to amount to fraud. Story, Bills, § 416.

¹² Chit. Bills, 444; Sigourney v. Lloyd, 8 Barn. & C. 629, 3 Man. & Ry. 58, and 5 Bing. 525. And see, as to post-office orders, Fine Art Soc. v. Union Bank, 17 Q. B. Div. 705, although the statute for some purposes dispenses with indorsement. And payment by mistake, to a wrong person of the same name as the payee, will not discharge the acceptor, although such person was in possession of the bill. Benj. Chalm. Dig. art. 236. But, if the payee's name was fictitious, payment to one actually bearing the name would be good as against a holder claiming in the fictitious name. Anonymous, 12 Mod. 564.

¹³ Draper v. Rice, 56 Iowa, 114, 7 N. W. 524, and 8 N. W. 797. But evidence of want of interest in the payee is admissible. Netterville v. Stevens, 2 How. (Miss.) 642.

¹⁴ The real ownership being a question between the principal and the agent, Durfee v. Morris, 49 Mo. 55.

to an administrator appointed in Illinois, it cannot be paid to a different administrator appointed in Indiana.¹⁵ So, it will not be sufficient to show that a bill has been paid by the drawer to the acceptor after maturity and after its transfer to a bona fide holder;¹⁶ or that it has been paid by the acceptor to the drawer, without proof of the drawer's ownership.¹⁷

By the Code Napoleon, it is sufficient if a note or bill is paid to the holder at maturity.¹⁸ But many foreign statutes provide that the holder must be identified, if the payor requires it.¹⁹ And provision is made in some countries for a stay of payment by the court; e. g. in case of loss of the bill.²⁰ And, to constitute a defense against a bona fide holder of the bill before maturity, payment must be made to the person holding the part that has been accepted.²¹

¹⁵ Although accounted for in Indiana by the Indiana administrator, *McCord v. Thompson*, 92 Ind. 565.

¹⁶ *Coffman v. Bank*, 41 Miss. 212.

¹⁷ Irrespective of the state of the accounts between the drawer and the indorsee by discounts and counter-discounts, *Agra v. Leighton*, L. R. 2 Exch. 56.

¹⁸ FRANCE (Code Com. art. 145); ITALY (Code Com. art. 230); NICARAGUA (Code Com. art. 275).

¹⁹ ARGENTINE REPUBLIC (Code Com. art. 870); BOLIVIA (Code Com. art. 393); CHILI (Code Com. art. 715); COLOMBIA (Code Com. art. 453); COSTA RICA (Code Com. art. 446); ECUADOR (Code Com., as in "Spain"); GREAT BRITAIN (Bills of Exchange Act, § 59); MEXICO (Code Com. art. 391); NICARAGUA (Code Com. art. 275); PERU (Code Com. art. 453); SALVADOR (Code Com. art. 450); SPAIN (Code Com. art. 499); URUGUAY (Code Com. art. 887).

²⁰ HOLLAND (Exch. Law, art. 164). Payment may be stayed if a bill is lost or stolen, or if the holder becomes bankrupt, in BELGIUM (Code Nap.); CHILI (Code Com. art. 716); FRANCE (Code Com. art. 149); ITALY (Code Com. art. 235); NICARAGUA (Code Com. art. 276); URUGUAY (Code Com. arts. 884, 885). In other states it may be stayed only where the bill is lost or stolen. ARGENTINE REPUBLIC (Code Com. arts. 867, 868); BOLIVIA (Code Com. art. 404); COLOMBIA (Code Com. arts. 450, 451); COSTA RICA (Code Com. arts. 443, 444); ECUADOR (Code Com., as in "Spain"); MEXICO (Code Com. arts. 388, 389); PERU (Code Com. arts. 450, 451); SALVADOR (Code Com. arts. 496, 497); SPAIN (Code Com. arts. 496, 497).

²¹ ARGENTINE REPUBLIC (Code Com. art. 865); BELGIUM (Code Nap.); BOLIVIA (Code Com. art. 398); CHILI (Code Com. art. 719); COSTA RICA (Code Com. art. 450); ECUADOR (Code Com., as in "Spain"); FRANCE (Code Com. art. 145); GREECE (Code Nap.); HAYTI (Code Nap.); HOLLAND

Payment to Joint Payees.

§ 1446. Payment of a bill or note may be made to either of several joint payees,²² or to the survivor of them,²³ or it may be made to any partner of a firm of payees.²⁴ And a part payment made to one partner, and indorsed by him, on a note belonging to his firm, cannot be disavowed by the firm, although made by crediting an individual debt of the partner.²⁵ Even where a check is made payable to a firm of partners designated as "Assignees of P.," and is deposited by the surviving partner to his own private account, it will be sufficient, unless the drawee had reason to know that the check was misapplied.²⁶ But if a note, payable to a firm, is indorsed by it to one of the partners, it cannot afterwards be paid to another partner after notice to the maker.²⁷

Payment of a bill or note, payable to a firm, will inure to the firm, if made to one of the partners after its dissolution.²⁸ And payment to one partner is notice of the payment to all, and the maker will not, in such case, be estopped by his subsequent statement to another partner, to the effect that the note was not paid, although such partner had no actual notice of payment and relied on the statement.²⁹ A partner has, however, no authority to receive currency

(Exch. Law, art. 160); ITALY (Code Com. art. 233); MEXICO (Code Com. art. 395); NICARAGUA (Code Com. art. 279); PERU (Code Com. art. 458); PORTUGAL (Code Com. art. 382); SALVADOR (Code Com. art. 456); SAN DOMINGO (Code Nap.); SPAIN (Code Com. art. 503); TURKEY (Code Nap.); URUGUAY (Code Com. art. 883); VENEZUELA (Code Com. art. 64).

²² *Wright v. Ware*, 58 Ga. 150. And such payment inures to the benefit of co-payees, and cannot be afterwards applied otherwise, by agreement between the maker and the payee who receives it. *Frost v. Martin*, 26 N. H. 422.

²³ Especially if he is also sole devisee of the deceased owner, *Perry v. Perry's Ex'rs*, 98 Ky. 242, 32 S. W. 755; and irrespective of the equitable rights of the deceased payee, *Allen v. Tate*, 58 Miss. 585.

²⁴ *Chit. Bills*, 444; 2 Pars. Notes & B. 209; *Duff v. East India Co.*, 15 Ves. 213.

²⁵ *Craig v. Hulschlizer*, 34 N. J. Law, 363.

²⁶ *Stewart v. Lee*, *Moody & M.* 160.

²⁷ *Stevenson v. Woodhull*, 19 Fed. 575.

²⁸ *Gannett v. Cunningham*, 34 Me. 56.

²⁹ *Bigelow v. Henniger*, 33 Kan. 362, 6 Pac. 593.

for a bill or note payable in gold; and, in accounting for the payment, he will be charged with the full amount that he should have received.³⁰

Payment to Persons under Disability.

§ 1447. At common law, a bill or note payable to a married woman could not be paid to her without the consent of her husband.³¹ And, although the instrument was payable to a single woman, yet, if she afterwards married, payment to her would not be good, although made without notice of the marriage.³² On the other hand, as the law now stands in most of the United States, it is not sufficient to pay to the husband a bill or note which is made payable to the wife.³³

In general, payment should not be made to a person who is under legal disability of any sort. Thus, if a bill or note is payable to an infant, it should be paid to his guardian, although it is said that payment to the infant himself would be valid, if it was beneficial to himself.³⁴ And the guardian of an infant cannot take his own note in payment of a debt due to his ward,³⁵ or receive as payment a credit on account of an individual debt of his own.³⁶

If the instrument is payable to one who is non compos mentis, payment made to him with knowledge of the appointment of a guardian will be invalid, although he is in possession of the paper.³⁷ So, too, a payment made to the agent of a lunatic, who is in possession of the note; the legal title being in the guardian, and the maker having notice of the payee's lunacy.³⁸

³⁰ *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506, 520.

³¹ *Byles*, Bills, 69; *Chit. Bills*, 444; 2 *Daniel*, Neg. Inst. 260; 2 *Pars. Notes & B.* 211; *Barlow v. Bishop*, 1 East, 432, 3 East, 226; *Thrasher v. Tuttle*, 22 Me. 335. And see § 321, *supra*.

³² *Story*, Bills, § 413. And a note made to a married woman might be paid to her husband, even after a divorce a mensa et thoro. *Dean v. Richmond*, 5 Pick. (Mass.) 461.

³³ *Carver v. Carver*, 53 Ind. 241; unless the husband was the real party in interest, *Dunn v. Hornbeck*, 72 N. Y. 80, affirming 7 Hun (N. Y.) 629.

³⁴ *Chit. Bills*, 444; *Story*, Bills, § 414.

³⁵ *Heflin v. Bevis*, 82 Ind. 388.

³⁶ *Baughn v. Shackelford*, 48 Miss. 255.

³⁷ *Leonard v. Leonard*, 14 Pick. (Mass.) 280.

³⁸ *Tarpley v. McWhorter*, 56 Ga. 410.

The subject of payment to an alien enemy has been already considered in an earlier chapter.³⁹

Payment may be made to a bankrupt before commission of bankruptcy actually issued, if it is made in good faith.⁴⁰ But such payment will be insufficient, if made with knowledge that an act of bankruptcy has been committed,⁴¹ or that a receiver has been appointed.⁴² So, too, after a judicial order for payment to a creditor of the payee.⁴³ After an assignment in bankruptcy by the payee, it will be sufficient to make payment to the assignee.⁴⁴

Payment to Executor.

§ 1448. Where the payee is dead, the bill or note must be paid to his personal representative.⁴⁵ But if the will has been admitted to probate, and an executor appointed, payment to such executor will be valid, although the probate is afterwards annulled, and the will declared to be a forgery.⁴⁶ And, where the executor named in a will has died, it has been held to be sufficient in equity to make payment to his administrator.⁴⁷ And a tender made to a foreign administrator, on condition of indemnity being given by him, has been held to be sufficient to stop the running of interest on a note,

³⁹ See § 255, *supra*.

⁴⁰ Chit. Bills, 447; 6 Geo. IV. c. 16; 2 & 3 Vict. c. 29; *Coles v. Robins*, 3 Camp. 183.

⁴¹ *Kitchen v. Bartsch*, 7 East, 53, 1 Bos. & P. 378. And a check cannot be paid by the drawee bank without inquiry after notice that the drawer has made an assignment (although it did not know that the check was drawn after the assignment and dated back), and the assignee may recover against the bank. *Chaffee v. Bank*, 40 Ohio St. 1.

⁴² *O'Connor v. Bank*, 54 Hun, 272, 7 N. Y. Supp. 380.

⁴³ *Rice v. Jones*, 103 N. C. 226, 9 S. E. 571.

⁴⁴ Chit. Bills, 445; 2 Edw. Bills & N. § 743; *Tennant v. Strachan*, *Moody & M.* 377, 4 Car. & P. 31. And payment to the assignee of an insolvent payee is good as against a purchaser after maturity, notwithstanding an injunction against payment. *Kelley v. Cowing*, 4 Hill (N. Y.) 266.

⁴⁵ But an executor has no authority to receive payment in goods or property. *Means v. Harrison*, 114 Ill. 248, 2 N. E. 64.

⁴⁶ Chit. Bills, 444; *Allen v. Dundas*, 3 Term R. 125.

⁴⁷ *Barker v. Talcot*, 1 Vern. 473; *Catherwood v. Chabaud*, 1 Barn. & C. 150, 2 Dowl. & R. 271.

where the holder died in another state.⁴⁸ An executor has no authority, however, to receive payment by a bill of exchange.⁴⁹

Where the payee has died, it will not be sufficient to make payment to her husband or his attorney;⁵⁰ or to the payee's widow, who has obtained possession of the note without indorsement and in fraud of the payee's estate.⁵¹ But payment to his heirs and children at the request of his administrator may be shown under a plea of payment.⁵²

Payment to Trustee.

§ 1449. Payment should properly be made to the owner of a bill or note.⁵³ If it is payable to one person in trust for, or for the use of, another, it should be paid to the trustee, and not to the *cestui que trust*.⁵⁴ But although a negotiable note is secured by a trust deed providing for payment to the trustee named in the deed, payment to the trustee will be no defense against a bona fide holder.⁵⁵ So, if a negotiable note is secured by a collateral mortgage, it will not be sufficient to make payment to the mortgagee, after the note has been transferred by indorsement, although the maker

⁴⁸ *Heywood v. Hartshorn*, 55 N. H. 476. On the other hand, after action brought by the executor under probate in the foreign domicile, the maker cannot make payment to an administrator cum testamento annexo afterwards appointed in the place of the maker's residence. *Amsden v. Danielson* (R. I.) 35 Atl. 70.

⁴⁹ *Parham v. Stith*, 56 Miss. 465, or in Confederate currency, *Scott v. Atchison*, 36 Tex. 76. But he may receive such currency in payment of a note made to him at a time and place where such currency was in use, and was intended by the word "dollars" in the note, *Rogers v. Tullos*, 51 Miss. 685.

⁵⁰ *Stone v. Simonds*, 131 Mass. 457.

⁵¹ *Davis v. Lane*, 8 N. H. 224.

⁵² *Griswold v. Ward*, 7 N. J. Law, 95.

⁵³ *Byles, Bills*, 222; *Chit. Bills*, 444; 2 *Daniel, Neg. Inst.* 255; *Becke v. Smith*, 2 *Mees. & W.* 191; *Woodward v. Elliott*, 13 Ind. 516. But payment of a judgment on a note to the real owner will be a good defense against one holding the judgment as a naked trustee for such owner. *Pratt v. Dow*, 56 Me. 81.

⁵⁴ *Chit. Bills*, 444; 2 *Daniel, Neg. Inst.* 260; 2 *Pars. Notes & B.* 210; *Cramlington v. Evans*, 2 *Vent.* 310; *Marchington v. Vernon*, 1 *Bos. & P.* 101, note; *Smith v. Kendall*, 6 *Term R.* 123; *Thomassen v. Van Wyngaarden*, 65 *Iowa*, 687, 22 *N. W.* 927.

⁵⁵ *Minell v. Reed*, 26 *Ala.* 730.

had no notice of the transfer.⁵⁶ But a mortgage is not rendered negotiable because made to secure a negotiable note; and it has been held that payment made to the mortgagee by the owner of the property mortgaged will extinguish the mortgage, and be binding on the holder of the note.⁵⁷ So, too, if payment is made to the trustee named for that purpose in a collateral deed of trust and known to the purchaser of the note.⁵⁸ Where a mortgage secures several notes, and they are transferred to different parties, and the mortgage is transferred with the last of them, and afterwards paid to such transferee and satisfied by him, it has been held to be binding upon the holder of the note first transferred.⁵⁹

In Germany provision is made by statute for payment of a bill of exchange into court, if no demand is made at maturity.⁶⁰ And in England, as we have seen, payment may be made to a sheriff or other officer holding a bill or note under an execution.⁶¹ But payment to an official receiver, under a statute of the Confederate States requiring such payment, constitutes no defense against the rightful owner.⁶²

Payment to Agent.

§ 1450. Payment to the authorized agent of the owner is sufficient.⁶³ And the agent employed to collect a bill or note may him-

⁵⁶ *Burhans v. Hutcheson*, 25 Kan. 625.

⁵⁷ *Jennings v. Vickers*, 31 La. Ann. 679; although made after, but without notice of a transfer of the note. *Johnson v. Carpenter*, 7 Minn. 176 (Gil. 120).

⁵⁸ He being presumed to be the authorized agent of the holder until his authority is expressly revoked. *Goodfellow v. Stillwell*, 73 Mo. 17.

⁵⁹ *Young v. Miller*, 6 Gray (Mass.) 152.

⁶⁰ GERMANY (Exch. Law, art. 40).

⁶¹ 1 & 2 Vict. c. 110, § 12. And see § 825, *supra*.

⁶² *Luter v. Hunter*, 30 Tex. 688; *Levison v. Norris*, Id. 713; *Justice v. Hamilton*, 67 N. C. 111; *Ward v. Brandt*, 61 N. C. 71; *Blackwell v. Willard*, 65 N. C. 555.

⁶³ *Chit. Bills*, 444; 2 *Pars. Notes & B.* 209; *Favenc v. Bennett*, 11 East, 40; or to the owner's attorney, *Coore v. Callaway*, 1 Esp. 115, 1 Camp. 478; *Ely v. Harvey*, 6 Bush (Ky.) 620. Although the agent failed to demand the surrender of the note, as authorized by the statute. *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687. So, although terms of the note provided: "No credit allowed on this note unless indorsed on the back by the payee." *Kasson v. Noltner*, 43 Wis. 646.

self employ an attorney, to whom payment may be made.⁶⁴ But payment cannot be made to an agent who is an alien enemy, in time of war.⁶⁵ Where payment is made to an agent, his authority to receive it must appear.⁶⁶

But authority may be implied, as in other cases, from his official position or other circumstances.⁶⁷ Authority to receive payment will be presumed from mere possession of an instrument payable to bearer,⁶⁸ even before maturity,⁶⁹ and without the payee's indorsement.⁷⁰ But where a bill is indorsed in blank and put into the hands of one of the drawers for collection, and settlement is made by him with his co-drawers, as though it had been satisfied by him (the bill not being shown to them), they cannot set up the defense of payment against the holder, since they were not misled by its being in the possession of their co-drawer.⁷¹ Where the payee's wife is in possession of a bill, and surrenders it on payment to her, her possession, coupled with a general authority as agent to lend and receive money for her husband, will be sufficient.⁷² And it has even been held sufficient to make a payment to a person in the counting house of the payee, and apparently in charge of it, although he was not in fact so employed.⁷³

On the other hand, payment made to an agent, who is not in possession of the note, is not sufficient,⁷⁴ even though he had re-

⁶⁴ *Barclay v. Hopkins*, 59 Ga. 562; but not to a clerk or agent of the attorney, *Yates v. Freckleton*, Doug. 623.

⁶⁵ *Blackwell v. Willard*, 65 N. C. 555.

⁶⁶ *Dixon v. Haslett*, Tread. Const. (S. C.) 615; *Stiger v. Bent*, 111 Ill. 328; and it is not sufficient that he is the custodian of the note or the attorney of the holder, *Lochenmeyer v. Fogarty*, 112 Ill. 572.

⁶⁷ *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428; *Thomson v. Shelton*, 49 Neb. 644, 68 N. W. 1055.

⁶⁸ *Cone v. Brown*, 15 Rich. Law (S. C.) 262. And see § 364, *supra*.

⁶⁹ *Florat v. Marchand*, 26 La. Ann. 741.

⁷⁰ *Paulman v. Claycomb*, 75 Ind. 64.

⁷¹ *Featherstone v. Hunt*, 1 Barn. & C. 113, 2 Dowl. & R. 233.

⁷² *White v. Genobles*, 12 Rich. Law (S. C.) 311. But it is not sufficient to make payment to a son of the holder, who told the maker he had no authority to receive it, and trover lies against the maker to recover the note surrendered by the son. *Kingman v. Pierce*, 17 Mass. 247.

⁷³ *Barrett v. Deere*, Moody & M. 200; *Corfield v. Parsons*, 1 Crompt. & M. 730.

⁷⁴ *Howard v. Rice*, 54 Ga. 52. So, where the agent has delivered the note

received and transmitted earlier payments for the holder,⁷⁵ or interest on the note in question.⁷⁶ But an attorney who has possession for the purpose of suit will be presumed from that fact to have power to collect, and he or his agent may receive payment.⁷⁷

Giving a note to an agent for collection will raise a presumption of authority to receive payment and surrender the note, but not to release it upon a compromise of the debt or to pledge it.⁷⁸ An agent who holds a note for collection only has no authority to sell or transfer it;⁷⁹ or to fill up the holder's blank indorsement specially;⁸⁰ or to extend the time of payment;⁸¹ or to receive conditional payment.⁸²

If an agent has authority to sell property and take a note in payment in the principal's name, this will not include authority to receive payment of the note after it has been delivered to the prin-

to his principal. *Paris v. Moe*, 60 Ga. 90. So, the authority to receive part payment will not be implied from his originally negotiating the loan, and afterwards ascertaining for the borrower on what terms part payment would be accepted. *Mut. Ben. Ins. Co. v. Miles*, 81 Fed. 32. So, of A., to receive payment of a note payable to A. or bearer, before maturity and after transfer by him, will not be presumed if he is not in possession, although it may be proved otherwise. *Swegle v. Wells*, 7 Or. 222.

⁷⁵ *Bull v. Mitchell*, 47 Neb. 647, 66 N. W. 632; but, contra, though the agent was not in possession of the note, *Quinn v. Dresbach*, 75 Cal. 159.

⁷⁶ *Ilgenfritz v. Insurance Co.*, 81 Fed. 27; *Trull v. Hammond* (Minn.) 73 N. W. 642; *Richards v. Waller*, 49 Neb. 639, 68 N. W. 1053; *Western Security Co. v. Douglass*, 14 Wash. 215, 44 Pac. 257. But see, contra, where the interest payments had continued for many years, *Sax v. Drake*, 69 Iowa, 760, 28 N. W. 423.

⁷⁷ *Planters' Bank v. Massey*, 2 Helsk. (Tenn.) 360; although the attorney denied his authority, but had not, in fact, surrendered it, *McInliffe v. Wheelock*, 1 Gray. (Mass.) 600.

⁷⁸ *Padfield v. Green*, 85 Ill. 529; or to release one joint debtor on his giving collateral, *Crane v. Sickel*, 51 Neb. 828, 71 N. W. 724.

⁷⁹ *Smith v. Johnson*, 71 Mo. 382; *Goodfellow v. Landis*, 36 Mo. 168; even for the purpose of bringing suit, *White v. Hildreth*, 13 N. H. 104.

⁸⁰ *Child v. Powder Works*, 44 N. H. 354.

⁸¹ *Chappel v. Raymond*, 20 La. Ann. 277. So, he cannot take a renewal. *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274. But the principal, taking the benefit of the extension, ratifies it, and discharges the surety. *Woodbury v. Larned*, 5 Minn. 339 (Gil. 271).

⁸² *Bank of Scotland v. Dominion Bank* [1891] App. Cas. 592.

cipal.⁸³ But where a note for goods sold, taken in the agent's name, is afterwards paid at his store, in his absence, to his son (who gave a receipt, saying the note was not there), it has been held to be sufficient.⁸⁴ So, where the maker paid such a note before maturity, without notice of any revocation of the agent's authority.⁸⁵ So, a certificate of deposit made out in the agent's name, and received by the principal without protest, and afterwards stolen and collected by the agent.⁸⁶

Implied Agency.

§ 1451. Where a check is indorsed payable to the order of a bank cashier, and sent by messenger in a sealed envelope addressed to the cashier, together with a deposit ticket, and the envelope is broken open by the messenger and the money paid to him, the law implies no authority on his part to receive such payment, and the bank will be liable for the amount to the depositor.⁸⁷ So, where a check is given by the drawer to his agent to deposit in the trust company to the order of which it was drawn, and the trust company gives the agent a certificate of deposit as trustee for the drawer, and afterwards pays the certificate to the agent, who had no actual authority to receive it, it will not be a valid payment as against the drawer.⁸⁸ So, an agent who holds a note without indorsement, with a forged request from the maker for its payment, is not en-

⁸³ *Draper v. Rice*, 56 Iowa, 114, 7 N. W. 524, and 8 N. W. 797; *Holland v. Van Bell*, 89 Ga. 223, 15 S. E. 302; *Selberling v. Demaree*, 27 Neb. 354, 44 N. W. 46. So, power to receive a check. *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919.

⁸⁴ *Ulrich v. McCormick*, 66 Ind. 243.

⁸⁵ Especially where the maker afterwards ratified the agent's sale of the goods by taking the note from him and bringing suit on it. *Howe Mach. Co. v. Simler*, 59 Ind. 307.

⁸⁶ *Dewar v. Bank*, 115 Ill. 22, 3 N. E. 746.

⁸⁷ *Bristol Knife Co. v. First Nat. Bank*, 41 Conn. 421. So, tender to a cashier who held the note in a sealed envelope as a special deposit, and refused to receive payment under the owner's instructions, will not stop the running of interest on the note. *King v. Finch*, 60 Ind. 420.

⁸⁸ Although he had previously given a general power of attorney to the same agent, which was lodged with another bank and related to its affairs, and was not known to the trust company. *Sims v. Trust Co.*, 103 N. Y. 472, 9 N. E. 605.

titled to receive the principal, although he was actually authorized to receive the interest and to take a new note for the principal.⁸⁹

If a bank is named in an instrument as the place of payment, it is not thereby constituted the agent of the holder to receive payment for him.⁹⁰ But if a check drawn upon one bank is deposited in another, and credited on the depositor's pass book, the bank of deposit becomes a collecting agent for the holder, and is not liable to him as upon a cash deposit.⁹¹ And if a check is mailed for collection to the bank upon which it is drawn, the bank becomes the agent of the holder; and payment to it by the check of another bank, which is afterwards protested, will discharge the original drawer.⁹² But an agent who holds a check for collection cannot make the bank upon which it is drawn his agent by forwarding the check to it by mail, and so relieve himself from liability for failure to make due presentment, if the bank pays it by a worthless draft, and afterwards fails, but would have paid the check if duly presented over its counter.⁹³

Ratification and Revocation of Agency.

§ 1452. If payment is made to an agent who has no authority to receive it, and the money subsequently comes to the hands of his principal, the payment will be thereby ratified.⁹⁴ So, if the agent.

⁸⁹ Doubleday v. Kress, 50 N. Y. 410.

⁹⁰ See § 1119, *supra*; unless the note is there for collection, Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498; Bank of Montreal v. Ingerson (Iowa) 75 N. W. 351; First Nat. Bank v. Chilson, 45 Neb. 257, 63 N. W. 362; Glatt v. Fortman, 120 Ind. 384, 22 N. E. 300. So, a fortiori, if the place named is a private office, Callanan v. Williams, 71 Iowa, 363, 32 N. W. 383; although interest had been previously paid there, Klindt v. Higgins, 95 Iowa, 529, 64 N. W. 414; or merely a town designated generally, First Nat. Bank v. Free, 67 Iowa, 11, 24 N. W. 566.

⁹¹ National Gold Bank v. McDonald, 51 Cal. 64.

⁹² Farwell v. Curtis, 7 Biss. 160, Fed. Cas. No. 4,690.

⁹³ Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 18 Ill. App. 191.

⁹⁴ Schaffner v. Edgerton, 13 Ill. App. 132; although the principal is a guar-
dian and receives the payment as such, Baughn v. Shackelford, 48 Miss. 255.
So, if a messenger receives payment of a check without authority by direc-
tion of the holder's confidential clerk (who had the authority), and pays it
over to the clerk, who misappropriates it, it will bind the principal, Johnson

who received the payment without authority, was in possession of the note for safe-keeping without indorsement, and the payment was acquiesced in by the holder's silence for several years after it came to his knowledge.⁹⁵

Payment to an authorized agent may be countermanded by his principal.⁹⁶ And after his authority is revoked, payment to him by one having actual or implied notice of the revocation will be without effect.⁹⁷

Crossed Checks.

§ 1453. In England the practice of crossing a check, and thereby requiring its payment through a banker, has been known for many years under the common law.⁹⁸ By this practice, if a check is crossed either generally or specially (by designating a particular bank), it cannot be paid to any holder or agent other than a banking house or the particular banking house designated, except at the risk of the payor. It is believed that this practice has never obtained in the United States. The statute regulating it in England applies in terms only to "bills drawn on a banker payable on demand." In practice, however, other bills of exchange payable in Great Britain are not unfrequently crossed in like manner.

Previous to the present English statute regulating the subject, it was held that a negotiable check was not made specially payable to the bank which was named in the crossing, and that the crossing of the check did not amount to an indorsement to the bank or restrict the negotiability of the check.⁹⁹ The drawer was still bound, although the original crossing was struck out by the payee,

v. Donnell, 90 N. Y. 1; and the holder may sue the drawer for money paid him by the acceptor to take up the bill, *Baker v. Birch*, 3 Camp. 107.

⁹⁵ *Wardrop v. Dunlop*, 1 Hun. 325.

⁹⁶ *Lee v. Zagury*, 8 Taunt. 114.

⁹⁷ *Chit. Bills*, 444; 2 *Daniel, Neg. Inst.* 260; 2 *Edw. Bills & N.* § 739; 2 *Para. Notes & B.* 210; *Story, Bills*, § 413. So, payment to an attorney in possession, after revocation of authority by his client's death. *Lochenmeyer v. Fogarty*, 112 Ill. 572. But see, as to an indorsement by the payee's agent after his death to his widow, and payment to her without notice of his death, *Brennan v. Bank*, 62 Mich. 343, 28 N. W. 881.

⁹⁸ *Byles, Bills*, 26. The reader will find a review of the object and origin of crossed checks by *Parke, B.*, in *Bellamy v. Marjoribanks*, 7 Exch. 402.

⁹⁹ *Bellamy v. Marjoribanks*, 7 Exch. 402.

and the check crossed to his banker, and afterwards paid through him.¹⁰⁰ So, if a check crossed to D. & Co. was afterwards fraudulently negotiated by a clerk of the drawer, and subsequently crossed to G. & Co., it still remained negotiable; and payment to a bona fide holder through the later crossing was sufficient.¹⁰¹ The crossing of a check did not render it nonnegotiable, but if it was afterwards stolen, and paid to a bona fide holder, it would defeat the original payee.¹⁰² And before the passage of the recent acts the alteration of a crossing did not amount to forgery.¹⁰³ But an act was passed in 1876, enabling a drawer or holder to render a crossed check nonnegotiable by writing the word "Nonnegotiable" on it, and also making the alteration or obliteration of the crossing a forgery.¹⁰⁴ This statute was practically re-enacted by the Bills of Exchange Act now in force, which applies by its terms only to bills "drawn on a banker payable on demand."¹⁰⁵

Payment to Agent in Notes.

§ 1454. An agent can, in general, only take money in payment,¹⁰⁶ and the maker of a note, who knows the holder's character as an agent, must inform himself as to the extent of his authority.¹⁰⁷ So, giving a bank credit to the collecting bank, with notice of the capacity in which it holds the paper, is not a payment.¹⁰⁸ So, if

¹⁰⁰ Byles, Bills, 25, 520; Chit. Bills, 267; *Stewart v. Lee*, Moody & M. 158; *Bellamy v. Marjoribanks*, supra.

¹⁰¹ *Carlon v. Ireland*, 5 El. & Bl. 765.

¹⁰² So held under Acts 19 & 20 Vict. c. 25, and 21 & 22 Vict. c. 79; *Smith v. Bank*, L. R. 1 Q. B. 31, affirming L. R. 10 Q. B. 291.

¹⁰³ *Simmons v. Taylor*, 4 C. B. (N. S.) 463, under 19 & 20 Vict. c. 25.

¹⁰⁴ The Crossed Checks Act, 1876, 39 & 40 Vict. c. 81, repealing 19 & 20 Vict. c. 25, and 21 and 22 Vict. c. 79; Bills of Exchange Act, §§ 76-82.

¹⁰⁵ *Clarke v. London & County Banking Co.* [1897] 1 Q. B. 552, under § 82. But if for one not a customer, it is a conversion. *Kleinwort v. Comptoir National D'Escompte De Paris* [1894] 2 Q. B. 157; *Lacave v. Credit Lyonnais* [1897] 1 Q. B. 148.

¹⁰⁶ *Mudgett v. Day*, 12 Cal. 139; *Scott v. Gilkey*, 153 Ill. 168, 39 N. E. 265.

¹⁰⁷ He cannot receive goods. *Howard v. Chapman*, 4 Car. & P. 508.

¹⁰⁸ *Crane v. Bank*, 173 Pa. St. 566, 34 Atl. 296; *Moore v. Pollock*, 50 Neb. 900, 70 N. W. 541; *Bank of Montreal v. Ingerson* (Iowa) 75 N. W. 351; and the original collecting bank which directs credit to be given to it will be liable to the principal on failure of its subagent, *First Nat. Bank of Omaha v. First Nat. Bank of Moline* (Neb.) 75 N. W. 843. And see § 1457, *infra*.

a collection bank takes a certificate of deposit as payment, it must do so at its own risk.¹⁰⁹ In like manner, an auctioneer who sells for cash has no authority to bind his principal or discharge the purchaser by receiving a bill of exchange in payment.¹¹⁰ So, if a collecting agent takes a note in payment, it will not bind his principal.¹¹¹ And if an agent, employed to settle claims, takes a note, and sells it before maturity for less than its face, he will be liable for the balance due on the note to his principal.¹¹²

One who pays an agent by a bill or a note, with full knowledge that he has no authority to receive anything but cash, will still be liable to the principal.¹¹³ And this is true, although he pays in the notes of a third party.¹¹⁴ An agent cannot surrender a note secured by vendor's lien, and take another note in payment from a new purchaser.¹¹⁵ And if an attorney holding a claim for collection receives a note and retains it, and the claim is afterwards paid to him without authority from the principal, and without surrender of the note, the payment will be no defense against an indorsee of the note for value before maturity.¹¹⁶

¹⁰⁹ *Essex Co. Nat. Bank v. Bank of Montreal*, 7 Biss. 193, Fed. Cas. No. 4532; or a county warrant, *Herriman v. Shomon*, 24 Kan. 387.

¹¹⁰ *Williams v. Evans*, L. R. 1 Q. B. 352; although the auctioneer transferred the bill, fraudulently, to a third party, *Sykes v. Giles*, 5 Mees. & W. 645.

¹¹¹ *Moore v. Newbury*, 6 McLean, 472, Fed. Cas. No. 9,772; *Scott v. Gilkey*, 153 Ill. 168, 39 N. E. 265; *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12; *Spence v. Rose*, 28 W. Va. 333.

¹¹² *Allen v. Brown*, 51 Barb. (N. Y.) 86.

¹¹³ 2 *Daniel*, Neg. Inst. 294; *Scott v. Surman*, Willes, 400. On the other hand, if the note is collected before it is due, by the assignee of the agent, the amount may be recovered from him by the principal, and a satisfaction of the original judgment, on receipt by the agent of a note for it, will not be binding on the principal. *De Mets v. Dagron*, 53 N. Y. 635. So, the payment of a collateral insurance policy to an agent, by a draft which was not paid and which he had no authority to receive, will not discharge the note secured by the policy. *Drain v. Doggett*, 41 Iowa, 682.

¹¹⁴ *Browning v. Sledge*, 38 Tex. 102; *Jones v. Ransom*, 3 Ind. 327. So, *Popley v. Ashly*, 6 Mod. 147.

¹¹⁵ *Scott v. Atchison*, 38 Tex. 384. And the agent is liable if he takes a simple renewal, and surrenders the note, on instructions to take a renewal with a good indorser. *Central Georgia Bank v. Cleveland Nat. Bank*, 59 Ga. 667.

¹¹⁶ *Cundiff v. McLean*, 40 Tex. 391.

If an agent, selling goods for a commission merchant on credit, takes the purchaser's negotiable note, payable to himself or order within the time limited for the credit, he will not be liable to his principal for negligence, although the purchaser becomes insolvent before the note matures.¹¹⁷ So, an agent employed to collect rents in the country may receive bills of well-reputed persons in payment.¹¹⁸

Payment to Agent in Bank Notes.

§ 1455. It has been held that an agent is not liable for receiving bank notes in payment, although the bank fails two days afterwards;¹¹⁹ and even that a sheriff may receive current bank bills in payment of an execution, notwithstanding instructions of the judgment creditor to the contrary.¹²⁰ But in Vermont, where a sheriff was not authorized to receive bank notes, it has been held that the creditor could not be obliged to take them the next day (the bank having failed in the meantime), and that such bank notes were not a payment of the judgment.¹²¹

If an agent receives current funds in payment without special authority, he must account for the amount received, although the funds have since depreciated in value, and although his taking them was in accordance with a special custom of bankers.¹²² So, if an agent has authority to receive cash "in New York or Baltimore funds," it will not amount to an authority to receive the bill of an insolvent drawer.¹²³ And if an agent fraudulently receives "cotton money" without authority, the principal (who was then absent in the war) may dissent after the war is over, and still hold the maker liable on the note.¹²⁴ So, an agent cannot, in general, receive Confederate currency in payment of a bill or note payable in mon-

¹¹⁷ *Goodenow v. Tyler*, 7 Mass. 36.

¹¹⁸ *Knight v. Lord Plymouth*, 3 Atk. 480.

¹¹⁹ *Union v. Greene*, 1 Hurl. & N. 884.

¹²⁰ *Ex parte Board*, 4 Cow. (N. Y.) 420.

¹²¹ *Wainwright v. Webster*, 11 Vt. 576.

¹²² *Marine Bank of Chicago v. Chandler*, 27 Ill. 525.

¹²³ *Goldsborough v. Turner*, 67 N. C. 403.

¹²⁴ *Burrows v. Cook*, 17 Iowa, 436.

ey,¹²⁶ although it may be the only currency available at the time.¹²⁶ If no other currency is obtainable, the collecting bank must give notice of that fact to its principal, and get express authority to receive such currency.¹²⁷ But it has been held, in Texas, that an agent might receive Confederate currency under a general power to collect.¹²⁸ And even if he is not authorized to receive it, his act will be ratified, if it is afterwards taken from him by the principal.¹²⁹

Payment by Check.

§ 1456. An agent employed to collect a bill or note may, by usage, surrender it upon receipt of a check from the acceptor or maker, and will not be liable, although the check is not paid; although the drawer and indorser may be discharged by his taking the check.¹³⁰ Where a vendor draws on his purchaser, and indorses the bill for collection to the purchaser's bank, and it is charged by the purchaser's direction to his account, and the bank's check transmitted to the vendor, it has been held to be a sufficient payment, although the check was not paid by reason of the failure of the bank.¹³¹ But it has been held in New York that an agent presenting a draft for collection to the drawee (a trust company) will be liable, if he takes a check in payment which is dishonored on due presentment on account of the failure of the trust company.¹³² So, it has

¹²⁵ *Fretz v. Stover*, 22 Wall. 198; *Alley v. Rogers*, 19 Grat. (Va.) 366; especially after the death of the owner, *King v. Fleece*, 7 Helsk. (Tenn.) 273.

¹²⁶ *Mangum v. Ball*, 43 Miss. 288.

¹²⁷ *Waterhouse v. Bank*, 25 La. Ann. 77.

¹²⁸ *Reed v. Nelson*, 33 Tex. 471, in 1863. So, where the note was made to the agent in 1862. *Rodgers v. Bass*, 46 Tex. 506.

¹²⁹ *Murray v. Walker*, 44 Ga. 58.

¹³⁰ *Byles, Bills*, 228; *Chit. Bills*, 451; 2 *Pars. Notes & B.* 216; *Russell v. Hankey*, 6 Term R. 12; *Jefferson Co. Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, 39 S. W. 338; but he cannot receive a check payable in "Illinois currency," *Graydon v. Patterson*, 13 Iowa, 256; and he cannot surrender a collateral bill of lading, and receive the drawee's check in payment, without negligence, *Second Nat. Bank v. Cummings*, 89 Tenn. 609, 18 S. W. 115.

¹³¹ *Welge v. Batty*, 11 Ill. App. 46.

¹³² Notwithstanding the custom of New York banks to receive trust company checks like those of banks, *Nunnemaker v. Lanier*, 48 Barb. (N. Y.) 234; whether the drawer of the original bill has been discharged by it (as evi-

been held that if a collection agent surrenders a bill of exchange on receiving the drawee's check, and thereby discharges the drawer of the bill, he will be liable for the amount of the bill, if the check is not paid.¹³³ But his action will be ratified by the principal taking the check and transmitting it for collection.¹³⁴

Default of Subagents.

§ 1457. A collecting agent will be liable for the negligence of an attorney employed by him to collect a note.¹³⁵ So, an attorney who undertakes to collect a note payable in another place, and employs another attorney at that place for the purpose, will be liable if the amount is collected and embezzled by the attorney employed by him.¹³⁶ And, in general, a bank or other collecting agent, undertaking to collect a bill or note at a distance, and employing a sub-agent or correspondent for that purpose, will be liable for the default of such correspondent, if he collects and fails to remit the amount;¹³⁷ even though the original agent took the bill only for collection, promising to credit it when paid, and had not given the owner credit for it as paid.¹³⁸

In like manner, a collecting bank is liable for the negligence of its correspondent employed by it to collect a bill or note in another

denced by a judgment rendered in another state), *First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 412; or not, *Id.*, 77 N. Y. 320, reversing 16 Hun (N. Y.) 332.

¹³³ *Whitney v. Esson*, 99 Mass. 308, any usage to the contrary being held to be unreasonable. But see, as to custom to receive certified check, *Jefferson Co. Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, 39 S. W. 338.

¹³⁴ *Rathbun v. Steamboat Co.*, 76 N. Y. 376. But, if the agent was directed to collect money and send it by express, he will be liable if he takes a check, although the principal received it without objection, until after he learned of the drawer's insolvency. *Walker v. Walker*, 5 Heisk. (Tenn.) 425. •

¹³⁵ E. g. in taking a note in payment, *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274, reversing 16 Wkly. Dig. 412.

¹³⁶ *Cummins v. Heald*, 24 Kan. 600; *Abbott v. Smith*, 4 Ind. 452. But see, contra, *Plymouth Co. Bank v. Gilman*, 9 S. D. 278, 68 N. W. 735.

¹³⁷ *Commercial Bank of Pennsylvania v. Union Bank of New York*, 11 N. Y. 203; *Naser v. Bank*, 116 N. Y. 492, 22 N. E. 1077; *Bank of Clarke Co. v. Gilman*, 81 Hun, 486, 30 N. Y. Supp. 1111; *Simpson v. Waldbury*, 63 Mich. 447, 30 N. W. 199; *Power v. Bank*, 6 Mont. 251, 12 Pac. 597.

¹³⁸ *Mackersy v. Ramsays*, 9 Clark & F. 818.

place.¹³⁹ And it has been held that it is alone liable to the principal, and that the liability of the correspondent for its negligence is to the bank that employed it.¹⁴⁰ If a bank receives a check for collection, and forwards it to the drawee (its own correspondent), under an existing arrangement that all collections shall be credited in a collection account and settled weekly, it will be liable to its principal for the amount of the check as paid, although the drawee, after charging it to the drawer and crediting the amount to the collecting bank under the arrangement with it, failed the next day.¹⁴¹ An indorsee for collection under a general indorsement has authority to retain the proceeds of the collection against a debt due him from the indorser, the indorsement being itself prima facie evidence of his bona fide ownership.¹⁴² But in Maryland, if a bill is collected by a subagent, and credited to the intermediate agent employing him, who failed before making payment to his principal, the subagent will still be liable to the owner of the bill, unless he has made fresh advances or parted with value on the strength of it.¹⁴³ If, however, the bill is indorsed to the agent

¹³⁹ *Titus v. Bank*, 35 N. J. Law, 588; *Kirkham v. Bank* (Sup.) 49 N. Y. Supp. 767. But see, contra, *Fabens v. Bank*, 23 Pick. (Mass.) 330, where the first collecting bank held the note as collateral.

¹⁴⁰ *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Castle v. Bank*, 148 N. Y. 122, 42 N. E. 518, affirming 75 Hun, 89, 26 N. Y. Supp. 1035; *Reeves v. Bank*, 8 Ohio St. 465. But see, contra, *Kelley v. Bank*, 17 App. Div. 496, 45 N. Y. Supp. 533, where the representative character of the intermediate bank was known to the subagent.

¹⁴¹ *Briggs v. Bank*, 89 N. Y. 182. So, if an acceptance is deposited for collection in bank A., and forwarded by it to bank B., where it was payable, to be collected and remitted to another bank, C., and credited by it to the bank A., and payment is duly made to the bank C., and credited by it to A., and the A. bank advised of the credit, it will amount to payment in an action by the owner against the C. bank, although the bank A. failed the day before the credit was made, and never remitted the amount, *Charlotte Iron Works v. American Exch. Nat. Bank*, 34 Hun (N. Y.) 26; and see *Hyde v. Bank*, 7 Biss. 156, Fed. Cas. No. 6,970. So, if a note is indorsed in blank to an attorney for collection, and by him to a bank, and is collected by it and credited to his account, and afterwards allowed as a credit to him in a settlement between the bank and his assignee in bankruptcy, the holder cannot recover against the bank in an action brought immediately after learning of the collection a year later. *Wood v. Bank*, 129 Mass. 358. And see § 726, supra.

¹⁴² *Bank of Metropolis v. New England Bank*, 1 How. 234.

¹⁴³ *Miller v. Bank*, 30 Md. 302. And it will be liable for the full amount

"for my use," and is discounted by a bank, and afterwards collected and credited to the agent's account, on his failure in debt to the bank, it will be liable to the owner notwithstanding the credit given to the agent.¹⁴⁴ So, if an agent receives and deposits a check for collection, and the money can be followed as that of the principal, the bank subsequently collecting it cannot set off against it a note made by the agent to the bank.¹⁴⁵

§ 1458. — If a collecting agent receives a note for transmission, and forwards it for collection, its correspondent is the agent of the owner, and liable to him for negligence in the collection.¹⁴⁶ On the other hand, the forwarding bank has been held to have no duty but that of forwarding in due time, and therefore not to be liable for the negligence of its correspondent.¹⁴⁷ Where the correspondent or subagent in the place of payment employs a notary, exercising ordinary diligence in the choice, the original bank will not be liable for the negligence of the notary employed.¹⁴⁸ But in New York

collected, although it is insolvent and in the hands of a receiver, and the funds collected have not been kept separate. *Thompson v. Institution* (N. J. Ch.) 8 Atl. 97.

¹⁴⁴ *Sigourney v. Lloyd*, 8 Barn. & C. 622, affirmed in 5 Bing. 525.

¹⁴⁵ *Overseers of Poor of Norfolk v. Bank of Virginia*, 2 Grat. (Va.) 544.

¹⁴⁶ *Farmers' Bank v. Owen*, 5 Cranch, C. C. 504, Fed. Cas. No. 4,662; *Wilson v. Smith*, 3 How. 763; *Bank of Lindsborg v. Ober*, 31 Kan. 600, 3 Pac. 324.

¹⁴⁷ *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243; *Bank v. Cummings*, 89 Tenn. 600, 18 S. W. 115; *Planters' & Farmers' Nat. Bank v. First Nat. Bank*, 75 N. C. 534; *Bank v. Butler*, 41 Ohio St. 519; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112. These cases do not seem to be supported by authority, except so far as notary's defaults are concerned.

¹⁴⁸ *Britton v. Nicolls*, 104 U. S. 757. This case was decided on the authority of the Mississippi cases. In it Mr. Justice Field says (page 762) of *Allen v. Bank*, 22 Wend. 215: "The decision has since been followed in New York, and its doctrine, we believe, has been adopted in Ohio. But in the courts of other states it has been generally rejected, and the views expressed by the superior court approved." And of the notary employed by the collecting bank he says (page 766): "He was a public officer, whose duties were prescribed by law; and when the notes were placed in his hands, in order that such steps should be taken as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty, he alone was liable. The bankers were no more liable than they would be for the unskillfulness of a lawyer of reputed ability and learning, to whom they might have handed the notes

a bank is held liable for the negligence of the notary employed by it.¹⁴⁹ And this rule has been followed in other states generally.¹⁵⁰ And if a bank employed as a collecting agent selects a notary who is plainly incompetent or inexperienced, it will be liable for his negligence.¹⁵¹

Duty of Collecting Agent.

§ 1459. It is the duty of a notary, in general, to follow the instructions given him by the party employing him, and he will not be liable if he does so, although such instructions are not correct.¹⁵² If an indorsement is illegible, it is the duty of the agent to use reasonable diligence in discovering the name and address of the party; and such diligence must appear in order to excuse the giving of proper notice.¹⁵³ A collecting agent must not only show due diligence on his part, but must return the note promptly.¹⁵⁴

for collection, in the conduct of a suit brought upon them." So, too, *Tiernan v. Bank*, 7 How. (Miss.) 648; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. (Miss.) 592; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Jackson v. Bank*, 6 Har. & J. (Md.) 146; *Dorchester & M. Bank v. New England Bank*, 1 Cush. (Mass.) 177; *Baldwin v. Bank*, 1 La. Ann. 13; *Frazier v. Banking Co.*, 2 Rob. (La.) 294.

¹⁴⁹ *Ayrault v. Bank*, 47 N. Y. 570, affirming 1 Abb. (N. S.) 381; but not for expense in holder's suit against indorser, *Downer v. Bank*, 6 Hill, 648. These cases are decided on the authority of *Allen v. Bank*, 22 Wend. 215, reversing 15 Wend. 482. This case held only that a New York bank, sending a bill to Pennsylvania for collection, was liable for the failure on the part of the Pennsylvania notary to give notice of nonacceptance, as required by New York law, although the Pennsylvania law required no such notice. The New York bank had failed to inform its correspondent as to the New York law, and was liable by reason of its own negligence.

¹⁵⁰ So held, as to notice of dishonor, in *Davey v. Jones*, 42 N. J. Law, 28; *Bank of Lindsborg v. Ober*, 31 Kan. 600, 3 Pac. 324; and as to demand, in *American Exp. Co. v. Haire*, 21 Ind. 4. In the words of Van Syckel, J., in *Davey v. Jones*, *supra*: "A bank which assumes the duty of a collecting agent is absolutely liable for any negligence or default of a notary or correspondent, as well as of its own immediate servants, in relation to it." But see, *contra*, *First Nat. Bank v. Butler*, 41 Ohio St. 519.

¹⁵¹ *Smedes v. Bank*, 20 Johns. (N. Y.) 372; *Bank of Lindsborg v. Ober*, 31 Kan. 509, 3 Pac. 324.

¹⁵² 2 Daniel, Neg. Inst. 8.

¹⁵³ *McGeorge v. Chapman*, 45 N. J. Law, 395.

¹⁵⁴ *Wingate v. Bank*, 10 Pa. St. 104; *Tyson v. Bank*, 6 Blackf. (Ind.) 225.

But he will not be liable for its loss if it was transmitted by him for collection to the place of payment with the knowledge of the owner.¹⁵⁵ If, however, an unreasonable time is lost in ascertaining and notifying the holder of the loss of a check forwarded by mail, and an opportunity to protect himself is thereby lost, the agent will be liable for his negligence.¹⁵⁶ And if an agent, who is liable for the loss of a note, promises to pay the amount, his estate will be liable on such promise.¹⁵⁷ The liability of the agent for negligence may, however, be waived by long acquiescence on the part of his principal.¹⁵⁸

If a bank acts as principal without disclosing its agency, it will be liable as principal to other parties, notwithstanding a custom of banks not to disclose such agency.¹⁵⁹ But where a bank acts as agent both for the drawer and the acceptor of a bill made payable at the bank, and payment is countermanded before maturity by the acceptor, the bank is not liable to the drawer for negligence in not giving notice of such circumstance.¹⁶⁰

Presentment and Notice by Agent.

§ 1460. Where a bill of exchange is payable at a certain time after date, presentment for acceptance is necessary, as we have seen, and it is the duty of an agent, holding the bill for collection, to present it immediately for acceptance; and he will be liable for negligence if he fails to do so.¹⁶¹ And an agent is liable for negligence if he takes an insufficient acceptance.¹⁶² But it is not negligence to leave a bill for acceptance, and receive it back three days afterwards with the acceptance canceled, the drawer having

Stancill v. Gilmore, 6 La. Ann. 703; and an offer to return the note is not an excuse for want of diligence, *Livaudais v. Denis*, 4 La. Ann. 300.

¹⁵⁵ *Jacobsohn v. Belmont*, 7 Bosw. (N. Y.) 14.

¹⁵⁶ *Shipsey v. Bank*, 59 N. Y. 485.

¹⁵⁷ *Sandefur v. Mattingley*, 16 Ark. 237.

¹⁵⁸ *Towle v. Stevenson*, 1 Johns. Cas. (N. Y.) 110.

¹⁵⁹ *Canal Bank v. Bank*, 1 Hill (N. Y.) 287.

¹⁶⁰ *Crosse v. Smith*, 1 Maule & S. 545.

¹⁶¹ *Allen v. Suydam*, 20 Wend. (N. Y.) 321. And see § 569, *supra*.

¹⁶² E. g. by the personal acceptance of the officer of the corporation on which the bill is drawn, *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 5 Sup. Ct. 141.

in the meantime mislaid the bill, which was called for at its request each day by the agent.¹⁶³

It is also the duty of a collecting agent to present the instrument for payment, and to protest it, if necessary, so as to charge the indorser.¹⁶⁴ And where the bill is not presented for payment at maturity, and the drawer's funds (which were there at that time) are afterwards withdrawn and the drawer becomes insolvent, the agent is held liable for the face of the bill.¹⁶⁵ So, if a postdated check is deposited with the bank, on which it was drawn, several days before it is payable, and is not presented until several days after maturity, when the drawer had failed (after depositing in the meantime, and withdrawing again, more than sufficient funds), the bank will be liable to its depositor for negligence in making an insufficient demand.¹⁶⁶ So, a bank will be liable if it makes the demand at too late a day, by allowing grace on paper which is not entitled to it;¹⁶⁷ or if it marks a note "Paid" prematurely, and remits a draft in payment, and afterwards recalls the draft and protests the note on its dishonor at a later day.¹⁶⁸ But in order to hold an agent for negligently making demand on a wrong day, the negligence should be particularly averred in the pleading.¹⁶⁹

It is sufficient if the agent presents a bill or note according to the usage of the place where it is payable; e. g. by notifying the maker just before maturity in accordance with the usage of the Boston banks.¹⁷⁰ But if a check is presented to the drawee by mail, and the money is lost in consequence by the insolvency of the bank, which gave a bad draft in payment, but would have paid over the counter in cash, the agent has been held to be liable for negligence in Pennsylvania.¹⁷¹ In New York, however, an agent who presents a note

¹⁶³ *Bank of Van Diemen's Land v. Bank of Victoria*, L. R. 3 P. C. 526.

¹⁶⁴ *Steele v. Russell*, 5 Neb. 211; *Armington v. Light Co.*, 15 La. 414.

¹⁶⁵ *Laughlin v. Greene*, 14 Iowa, 92. And see §§ 1055, 1056, 1090, 1103, 1105, *supra*.

¹⁶⁶ Especially as it had secured the larger part of the drawer's assets on its own account, *Bank of New Hanover v. Kenan*, 76 N. C. 340.

¹⁶⁷ *Durnford v. Patterson*, 7 Mart. (La.) 460.

¹⁶⁸ *Whiting v. City Bank*, 77 N. Y. 363.

¹⁶⁹ *Hough v. Young*, 1 Ohio, 504.

¹⁷⁰ *Warren Bank v. Parker*, 8 Gray (Mass.) 221. And see §§ 1106, 1133, 1134, *supra*.

¹⁷¹ *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 424, 2 Atl. 687.

by mailing it to the bank where it is payable, without indorsement and according to the custom of banks there, does not create an agency in the second bank, and is not liable for negligence in receiving a bank check which was afterwards promptly presented by him and dishonored.¹⁷² But if an agent receives a draft in payment, and fails to use due diligence in presenting and protesting it, he will be liable to his principal.¹⁷³

Notice by Agent—Damages.

§ 1461. If an agent neglects to give proper notice of dishonor, and the indorser is discharged thereby, he will be liable for the face of the note.¹⁷⁴ The law requires no greater diligence in this respect from a collecting agent than from an indorsee or purchaser.¹⁷⁵ If the indorser lives in the same town, and is, therefore, entitled to personal notice, it will be negligence for the collecting bank to give him notice by mail.¹⁷⁶ So, it is incumbent upon the agent to give notice of dishonor at the proper time,¹⁷⁷ and to the proper person. But if the notary is instructed by his indorser to send notice of dishonor to the collecting bank, he will not be liable for failure to give notice to the owner, who indorsed to the bank.¹⁷⁸ So, a collecting agent will not be liable for giving notice to a wrong person of the same name as the indorser, if he was guilty of no negligence in the matter, although the indorser was discharged thereby.¹⁷⁹ So, he will not be liable for sending notice to the wrong address, on misinformation received, in the holder's absence, from his wife.¹⁸⁰ And although it is the duty of an agent to give notice of dishonor, it will be dispensed with by anything constituting an

¹⁷² *Indig v. Bank*, 80 N. Y. 100, reversing 16 Hun, 200.

¹⁷³ *Capitol State Bank v. Lane*, 52 Miss. 677. And see §§ 1137, 1139, *supra*.

¹⁷⁴ But the holder must prove that the maker was insolvent and the indorser able to pay. *Borup v. Nininger*, 5 Minn. 523 (Gil. 417). As to the agent's duty in giving notice of dishonor, see §§ 1198, 1236, *supra*.

¹⁷⁵ *Farmers' & Mechanics' Bank v. Turner*, 2 Litt. (Ky.) 13.

¹⁷⁶ *Bowling v. Harrison*, 6 How. 248.

¹⁷⁷ *Bank of Washington v. Triplett*, 1 Pet. 25. And see §§ 1262, 1268, *supra*, as to the time for giving such notice.

¹⁷⁸ *Moore v. Corning*, 12 La. Ann. 256. And see §§ 1240, 1241, *supra*.

¹⁷⁹ *Mount v. Bank*, 37 Iowa, 457.

¹⁸⁰ *Bellemire v. Bank*, 4 Whart. (Pa.) 105.

excuse for notice.¹⁸¹ A collecting agent must also use due diligence at common law (although not by the law merchant) in collecting collateral securities.¹⁸²

The measure of damages for which a collecting agent is liable is, in general, the face of the paper, with interest.¹⁸³ But an agent will be liable only for the amount actually collected by him in a compromise, which was submitted to the principal and accepted by him.¹⁸⁴ In Louisiana, where the agent has been guilty of negligence in making a proper demand of payment, the burden is on him to show that no damages were sustained by the holder.¹⁸⁵

Payment to Payee.

§ 1462. When a bill or note is payable to order, payment to a holder without indorsement will not be sufficient;¹⁸⁶ especially where the holder does not produce the instrument to be paid.¹⁸⁷ If payment is made to the payee, it must be made before indorsement by him.¹⁸⁸ And payment made to the payee after transfer to another is of no avail, whether the payment be made before maturity,¹⁸⁹ or after maturity,¹⁹⁰ even as against a transferee after

¹⁸¹ *West Branch Bank v. Fulmer*, 3 Pa. St. 399; *Van Wart v. Woolley*, 3 Barn. & C. 439, 5 Dowl. & R. 374.

¹⁸² *Lawrence v. McCalmont*, 2 How. 426. And he will be liable for negligence if he surrenders a collateral bill of lading on receipt of a draft. *National Bank of Commerce v. Merchants' Bank*, 91 U. S. 92.

¹⁸³ *First Nat. Bank v. Fourth Nat. Bank*, 24 Hun (N. Y.) 241; less commissions agreed on, *Wingate v. Bank*, 10 Pa. St. 104; *Tyson v. Bank*, 6 Blackf. (Ind.) 225. But see *Mitchell v. Schuert*, 16 Mich. 444, to the effect that the actual value of the note, and not its face, is the measure of damages. And see §§ 1198, 1236, *supra*.

¹⁸⁴ *Armstrong v. Gilchrist*, 2 Johns. Cas. (N. Y.) 424.

¹⁸⁵ *Miranda v. Bank*, 6 La. 744.

¹⁸⁶ See §§ 787, 1079, *supra*. Although after its maturity, *Rumsey v. Schmitz*, 14 Kan. 542; and notwithstanding that a special indorsement was made by the payee "for collection," *Barnett v. Ringgold*, 80 Ky. 289.

¹⁸⁷ *Hannon v. Sullivan*, 3 Mo. App. 583.

¹⁸⁸ *Webster v. Lee*, 5 Mass. 334.

¹⁸⁹ *Burhans v. Hutcheson*, 25 Kan. 625; *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855; *Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29; *Bull v. Mitchell*, 47 Neb. 647, 66 N. W. 632; *Block v. Kirtland*, 21 Ark. 393. So, too,

¹⁹⁰ *Capital City Ins. Co. v. Quinn*, 73 Ala. 558.

maturity.¹⁹¹ So, payment to a former holder, upon a receipt given with a promise to produce and surrender the bill in a few days, is of no avail against a bona fide purchaser for value before maturity.¹⁹²

In like manner, although a note is payable to bearer, it cannot be paid to the original holder upon his receipt, after it has been transferred by him.¹⁹³ So, if a note payable to an agent or bearer is paid to the agent, the payment will be no defense against the principal, if made before maturity and after transfer of the note to the principal.¹⁹⁴ So, if a demand note is paid to the payee on his separate receipt, after transfer by him, it will not bind the indorsee.¹⁹⁵ So, payment made to the payee of a note after it has been indorsed for accommodation by a second indorser, and has been taken up by him at maturity, will not bind such indorser.¹⁹⁶ So, if a renewal note is given to the original payee, after transfer of the original note without the maker's knowledge, the indorsee can bring suit upon the original note, although the renewal was afterwards transferred to him with notice of the circumstances under which it was made.¹⁹⁷

of transfer without indorsement. *Loan Ass'n v. Merritt*, 112 N. C. 243, 17 S. E. 296. But it is admissible against a subsequent transferee for usurious and illegal consideration. *Cuswell v. Railroad*, 50 Ga. 70. And see § 693, supra. And an indorsee may lose his right (as against the acceptor of a bill) to object to such payment where he has acquiesced in it for three years, and charged the bill to the payee, and failed to apply his funds to it, although he often had sufficient funds in hand, or to prove it in bankruptcy against the payee. *Field v. Carr*, 2 Moore & P. 46, 5 Bing. 13. So, he may by his actions have made or held out the indorser as his agent to collect the bill. *Exchange Nat. Bank v. Johnson*, 30 Fed. 588.

¹⁹¹ *Harpending v. Gray*, 76 Hun, 351, 27 N. Y. Supp. 762; *Adair v. Lenox*, 15 Or. 489, 16 Pac. 182. But see, contra, *Haywood v. Seeber*, 61 Iowa, 574, 16 N. W. 727.

¹⁹² *Wilcox v. Aultman*, 64 Ga. 544.

¹⁹³ *Enochs v. Therrell*, 61 Miss. 178.

¹⁹⁴ *Mitchell v. Bristol*, 10 Wend. (N. Y.) 493.

¹⁹⁵ *Dorr v. Rowell*, 12 N. H. 49.

¹⁹⁶ Although he had taken from the payee his note, and retained the note in suit as collateral, and transferred it on the dishonor of the new note, *Carr v. Lewis*, 20 N. Y. 138.

¹⁹⁷ The indorsee taking no title to the renewal so made, *Newman v. Henry*, 29 Ark. 496.

§ 1463. — Even where a note secured by mortgage is transferred to an indorsee with notice of the mortgage, if the maker afterwards pays off the mortgage to the payee and has it canceled, such payment will be no defense against a bona fide holder, although made without notice of the transfer of the note.¹⁹⁸ So, payment of a note, after its maturity, to the payee, is no defense against a bona fide purchaser.¹⁹⁹ So, a payment to the payee's agent made without surrender of the note after it had been fraudulently transferred by the agent to a bona fide holder.²⁰⁰

It will not be sufficient to make payment to the payee after indorsement by him, although an employé in the indorsee's bank told the maker to see the payee about it.²⁰¹ And payment to the payee, after transfer without notice to the maker, will not throw upon a purchaser before maturity the burden of proving himself a holder for value.²⁰² On the other hand, if a payee receives payment after indorsing the note "without any recourse whatever," he will not become liable on his indorsement to his indorsee, because the latter pays the note to a subsequent holder upon his defeat by the maker by reason of such payment to the payee.²⁰³

If the maker pays a bill or note to the payee after notice of its transfer, the payment will be of no effect.²⁰⁴ But if he pays a non-negotiable instrument to the assignor, after it has been transferred, but before notice of the transfer, it will be sufficient.²⁰⁵ It is a question for the jury whether the maker had notice of the trans-

¹⁹⁸ *Blumenthal v. Jassoy*, 29 Minn. 177, 12 N. W. 517.

¹⁹⁹ *Lathrop v. Donaldson*, 22 Iowa, 234.

²⁰⁰ *McLelland v. Bartlett*, 13 Ill. App. 236.

²⁰¹ *City Bank v. Taylor*, 60 Iowa, 66, 14 N. W. 128.

²⁰² *Emanuel v. White*, 34 Miss. 56.

²⁰³ *Welch v. Lindo*, 7 Cranch, 159.

²⁰⁴ *Sawyer v. Moran*, 3 Tenn. Ch. 35. So, by statute in COLORADO (1 Mills' Ann. St. § 246); ILLINOIS (Hurd's Rev. St. c. 98, § 6). So, too, although the suit is in the name of the payee. *Jones v. Witter*, 13 Mass. 304. So, a renewal given to the payee after notice of attachment will not bind the attaching creditor. *Leslie v. Merrill*, 58 Ala. 322.

²⁰⁵ *Bury v. Hartman*, 4 Serg. & R. (Pa.) 175. So, as to notes which (it was held) were rendered nonnegotiable by indorsement without recourse, *Warren v. Gruwell*, 5 Kan. App. 523, 48 Pac. 205; or by assignment without indorsement, *Vann v. Marbury*, 100 Ala. 438, 14 South. 273. But see, as to indorsement for collection, *Barnett v. Ringgold*, 80 Ky. 289.

fer.²⁰⁶ But where a duebill has been indorsed by the payee, and demand is made by the indorsee without showing the paper, and the maker said he would pay the bill in New York, and afterwards paid the payee there, such facts were held not to amount to notice of assignment, and the payment was held to be sufficient.²⁰⁷ On the other hand, where a nonnegotiable note was assigned as collateral security by a special assignment indorsed on it by the payee, and was afterwards taken by the payee to sell on condition of securing the assignee, the assignment was held to carry notice of the assignee's rights, and payment to a later purchaser was held to be insufficient.²⁰⁸ In Iowa, provision is made by statute for payment into court in the absence of the holder, where the maker has no notice of a transfer of the note.²⁰⁹

§ 1464. — If payment is made to the payee of a negotiable bill or note before any transfer, but before maturity, and without surrender of the paper, it will be no defense against a later purchaser for value before maturity.²¹⁰ This is true, also, of a part payment made before maturity or transfer, but not indicated on the paper, or otherwise brought to the purchaser's knowledge.²¹¹ But a payment made before maturity, on the payee's receipt, is admissible as a defense against a subsequent purchaser with notice.²¹² And in Massachusetts, by statute, a payment made on a demand note, which is afterwards transferred by the payee without applying the payment as directed, may be set up against the purchaser, and the maker will not be confined for redress to his action against the payee on the agreement.²¹³

²⁰⁶ *Knebelcamp v. Smith*, 3 Ill. App. 243.

²⁰⁷ *Meghan v. Mills*, 9 Johns. 64.

²⁰⁸ *Pier v. Bullis*, 48 Wis. 429, 4 N. W. 381.

²⁰⁹ IOWA (Code, § 3060).

²¹⁰ *Grant v. Kidwell*, 30 Mo. 455; *Swall v. Clarke*, 51 Cal. 227; *Burbridge v. Manners*, 3 Camp. 193; nor would a secret release to him before maturity protect him, *Dod v. Edwards*, 2 Car. & P. 602. And see § 680, *supra*. But payment of a nonnegotiable order to the drawer, holding it as collecting agent for the payee, will defeat an action brought by a subsequent purchaser of the order without notice of payment. *Stevens v. Parker*, 5 Allen (Mass.) 333.

²¹¹ *Mobley v. Ryan*, 14 Ill. 51.

²¹² *White v. Kibling*, 11 Johns. (N. Y.) 128. So, payment of a demand note to the payee by a credit in account. *Roberts v. Eden*, 1 Bos. & P. 398.

²¹³ *Sacket v. Loomis*, 4 Gray, 148; demand notes being subject in Massa-

If a note is not indorsed until after maturity, the maker may set up a payment made to the payee before such transfer,²¹⁴ or before notice of the transfer.²¹⁵ But, if the indorsee had no notice of the payment, the burden is on the maker to show that the payment was made before transfer, although the transfer was after maturity.²¹⁶ If the indorser of a note takes it up at maturity, and transfers it again, a payment, afterwards made to him by the maker without knowledge of the transfer, will not be available against such indorsee.²¹⁷

Payment to one after notice of transfer to another is of course bad. And this is true of a note transferred after maturity by one of two administrators, and paid to the other after notice of the transfer.²¹⁸

Payment to Pledgor—Pledgee.

§ 1465. A note or bill may be paid to the payee, although it is at the time in the hands of a collecting agent.²¹⁹ But payment cannot be made to the payee, after he has transferred the note before maturity, as collateral, without proof of his authority to receive payment.²²⁰ And payment made to him, with notice of the pledge by him, is no defense against the pledgee.²²¹ And if the bill or note

chusetts to any defense arising before notice of transfer, Pub. St. 1882, c. 77, § 14.

²¹⁴ *Brown v. Davies*, 3 Term R. 80; *Lewis v. Lyster*, 2 Crompt. M. & R. 704, 1 Gale, 320; *Topeka Bank & Sav. Inst. v. Jilz*, 3 Mo. App. 598; *Merrick v. Butler*, 2 Lana. (N. Y.) 103. And see § 678, *supra*.

²¹⁵ *Bank of Stockton v. Jones*, 65 Cal. 437, 4 Pac. 418; *Vatterlien v. Howell*, 5 Sneed (Tenn.) 44; *Haywood v. Seeber*, 61 Iowa, 574, 16 N. W. 727. And see IOWA (Code, § 3461).

²¹⁶ *Wilbour v. Turner*, 5 Pick. (Mass.) 226. But see, *contra*, *Capps v. Gorham*, 14 Ill. 198.

²¹⁷ *Davis v. Miller*, 14 Grat. (Va.) 1; *Smith v. Lawson*, 18 W. Va. 212.

²¹⁸ *Mackay v. St. Mary's Church*, 15 R. I. 121, 23 Atl. 108.

²¹⁹ *Payne v. Flournoy*, 29 Ark. 500; subject, however, to the lien of the collecting bank for advances, *Williams v. Jones*, 77 Ala. 294.

²²⁰ *City Bank v. Taylor*, 60 Iowa, 66, 14 N. W. 128; *State Sav. Ass'n v. Hunt*, 17 Kan. 533; *Best v. Crall*, 23 Kan. 482; *Williams v. Bank*, 72 Md. 441, 20 Atl. 191; *Gosling v. Griffin*, 85 Tenn. 737, 3 S. W. 642.

²²¹ *Fennell v. McGowan*, 58 Miss. 261; but is valid against a pledgee whose debt is paid, *Bank of the University v. Tuck*, 96 Ga. 456, 23 S. E. 467.

has been transferred as collateral, although the transfer is not known to the maker, he cannot set up against the pledgee a subsequent payment before maturity to the payee.²²² On the other hand, where the maker of a demand note has paid it to the payee on his receipt and promise "to give it up when called for," the note being then in the hands of a pledgee, such payment will be good as against another holder, to whom it was transferred by the payee as collateral more than eight months after its date.²²³ And if the transfer is made as collateral for a usurious debt, and is therefore void, the maker may set up a payment made to the assignor before notice of such transfer.²²⁴

One who holds a note as collateral is thereby authorized to collect it after the debt to him becomes due.²²⁵ And a valid recovery may be had by such pledgee, although the debt secured by the transfer has been paid, the recovery being in such case for the use of the pledgor.²²⁶ And if the maker pays the pledgee the amount of his debt, while he holds the note as security, the payment will be a good defense against the payee to that extent on a retransfer to him.²²⁷ But payment of the whole amount due on the note to a pledgee, after notice that the note had been taken in execution against the payee, will not be valid, as against the execution cred-

²²² *Griswold v. Davis*, 31 Vt. 390; *Best v. Crall*, 23 Kan. 482. In this case, the maker took the payee's receipt for the payment. So, too, in *Davis v. Miller*, 14 Grat. (Va.) 1. So, in New York, although a holder of collateral may not be a bona fide holder for value, in the commercial sense of the term. *Manhattan Co. v. Reynolds*, 2 Hill, 140. And such payment will not defeat foreclosure of a collateral mortgage by the indorsee. *Mead v. Leavitt*, 59 N. H. 476.

²²³ *American Bank v. Jenness*, 2 Metc. (Mass.) 288; the maker not having called for it for eight months and the payee being then bankrupt. So, in general, as against a pledgee after maturity, *Bank of Stockton v. Jones*, 65 Cal. 437, 4 Pac. 418; or against a pledgee to whom the payment was sent by the pledgor, *Butts v. Whitney*, 96 Ga. 445, 23 S. E. 397.

²²⁴ *Caswell v. Railroad Co.*, 50 Ga. 70.

²²⁵ *Huyler v. Dahoney*, 48 Tex. 234; *Lapice v. Clifton*, 17 La. 152. And the pledgee will be entitled to payment, notwithstanding a subsequent agreement by the payee's authorized agent to transfer the note to another person. *Sawyer v. Cutting*, 23 Vt. 486. But a pledgee cannot take Confederate currency in payment. *Ransom v. Alexander*, 31 Tex. 443.

²²⁶ *Logan v. Cassell*, 88 Pa. St. 288. And see § 795, *supra*.

²²⁷ *Jones v. Hawkins*, 17 Ind. 550.

itor, except to the amount due the pledgee.²²⁸ And, in general, the maker of a note should only pay the pledgee the amount of his debt, and should pay the balance to the owner of the note.²²⁹

Payment to Attaching Creditor.

§ 1466. Where the debt represented by a bill or note is subject to process of attachment, a valid payment may often be made to the attaching creditor.²³⁰ Thus, if the maker of a nonnegotiable note pays it, without notice of any transfer, to an attaching creditor of the payee, it will be good as against his assignee.²³¹ So, if a note is attached after it becomes due, it may be paid to the plaintiff in attachment, after judgment rendered against the payee, without waiting for judgment to be rendered against the maker as garnishee.²³² But in Louisiana payment made to an attaching creditor will not amount to a defense against an indorsee, unless the note was in the payee's possession at the time of the attachment.²³³

Where payment to an attaching creditor is sufficient, such payment is admissible under the plea of general issue.²³⁴ But the holder will not be bound by payment made to an attaching creditor of the payee in a proceeding which attacks the good faith of the transfer without making him a party, although he had notice of the proceeding and of the payment made in it.²³⁵ But the maker may set up payment to an attaching creditor of the payee upon a judgment in his favor, after transfer of the note, issue being taken on the fact whether the maker had notice of the assignment before payment.²³⁶ Where the payee brings suit on a nonnegotiable note, and neglects to aver that it was for the benefit of an assignee, who purchased it for value and gave the maker notice of assignment before it was attached, the maker may plead payment under at-

²²⁸ *Mower v. Stickney*, 5 Minn. 397 (Gil. 321).

²²⁹ *Wofford v. Ashcraft*, 47 Miss. 641.

²³⁰ See § 811 et seq.

²³¹ *Weinwick v. Bender*, 33 Mo. 80.

²³² *Somers v. Losey*, 48 Mich. 294, 12 N. W. 188.

²³³ *Denham v. Pogue*, 20 La. Ann. 195.

²³⁴ *Clark v. Yale*, 12 Wend. (N. Y.) 470. In this case the jury had found against the good faith of the plaintiff.

²³⁵ *Holland v. Smit*, 11 Mo. App. 6.

²³⁶ *Newman v. Manning*, 79 Ind. 218.

tachment against the payee, and an amendment will be necessary to entitle the payee to recover.²³⁷

Payment to Indorsee.

§ 1467. An indorsement, as we have seen, transfers the rights of the indorser, including his right to receive payment.²³⁸ But where it is restrictive in its terms, e. g. "for the use of" the indorser, payment to the indorsee will be insufficient, if misapplied by him.²³⁹ But payment may be made to an indorsee, even after the transfer to him has been rescinded, unless it is shown that the maker had notice of that fact.²⁴⁰

Valid payment to an indorsee implies indorsement by one who is legally capable of indorsing.²⁴¹ But it has been held to be sufficient for the maker to pay an indorsee under an indorsement by a corporate payee which is *ultra vires*.²⁴² If, however, the indorsement is for an illegal consideration, such as a gambling debt, payment made to the indorsee after notice of that fact will be of no avail as against the indorser.²⁴³ And if a bill or note is payable to several persons, who are not partners, an indorsement by one will not entitle the indorsee to payment.²⁴⁴

²³⁷ *Prescott v. Hull*, 17 Johns. (N. Y.) 284.

²³⁸ See § 729 et seq. A check payable to order cannot be paid to a holder other than the payee, without indorsement. *Dodge v. Bank*, 30 Ohio St. 1. But a note secured by a mortgage may be paid to one who holds it without indorsement by a separate assignment of the note and mortgage. *Pease v. Warren*, 29 Mich. 9.

²³⁹ *Sigourney v. Lloyd*, 8 Barn. & C. 622. And see § 724 et seq.

²⁴⁰ *Collier v. Hershey*, 21 Ark. 482.

²⁴¹ As to infant, see § 271, *supra*. The Negotiable Instrument Law makes an infant's indorsement a sufficient transfer of the title in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (section 22), MARYLAND (section 41), and NEW YORK (section 41). As to married woman, see § 288, *supra*.

²⁴² *Vanarsdall v. State*, 65 Ind. 176.

²⁴³ *Commercial Nat. Bank v. Spalds*, 8 Ill. App. 493. So, too, a payment with notice that the indorsement was made to defraud creditors (as against such creditors). *Wheeler v. Winn*, 38 Vt. 122.

²⁴⁴ *Ryhiner v. Felckert*, 92 Ill. 305. So, a bill by A. and B. (not partners), "to our order," and indorsed by A. only. *Carvick v. Vickery*, 2 Doug. 653, note.

Payment to Indorsee—Forgery.

§ 1468. If payment is made to one who holds a note under the unauthorized indorsement of the payee's agent, the holder (although he may be a bona fide purchaser) will be liable to the payee for the amount received.²⁴⁵ But under the present statute in England a check may be paid by the bank on which it is drawn, to one holding under such an indorsement.²⁴⁶ This act provides that, if a draft or check on a bank purports to be indorsed by the person to whom it is drawn payable, it shall be sufficient authority to the banker to pay the bearer, without proof that such indorsement was made by the payee or by his authority or that of the drawer or other indorser.²⁴⁷ In Germany, also, it is not incumbent on the payor of a bill to prove the indorsements to be genuine.²⁴⁸ But, by statute in some countries, the holder who receives payment of a bill is liable for the genuineness of the indorsements.²⁴⁹ And this is the general rule of the law merchant as to indorsers.

If an indorsement is forged, payment to one who holds under it will not, in general, be a defense against the lawful owner,²⁵⁰ even though the person who receives the payment is a bona fide holder for value.²⁵¹ So, it is no defense against the owner to prove a payment to one who held under a forgery, by which the bill was altered and made payable to bearer instead of to order.²⁵²

²⁴⁵ *Johnson v. Bank*, 6 Hun (N. Y.) 124.

²⁴⁶ *Charles v. Blackwell*, 2 C. P. Div. 151, affirming 1 C. P. Div. 548.

²⁴⁷ 16 & 17 Vict. c. 59, § 19; Bills of Exchange Act, § 60.

²⁴⁸ AUSTRIA (Exch. Law, art. 36); GERMANY (Exch. Law, art. 36); SWEDEN (Exch. Law, § 42); SWITZERLAND (Ob. R. 755).

²⁴⁹ HOLLAND (Exch. Law, art. 166); PORTUGAL (Code Com. art. 387).

²⁵⁰ 2 Para. Notes & B. 211, 595; Story, Bills, §§ 412, 450; *Smith v. Sheppard*, 1 Chit. 180, note; *Johnson v. Windle*, 3 Bing. N. C. 225. The lawful payee may, however, waive the forgery, and elect to sue the person receiving the money as paid to his use. *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85. But the maker could not sue in such case. *Hensel v. Railway Co.*, 37 Minn. 87, 33 N. W. 329.

²⁵¹ Byles, Bills, 224; Chit. Bills, 446; 2 Daniel, Neg. Inst. 264; 1 Edw. Bills & N. § 271; *Long v. Baille*, 2 Camp. 214; *Mead v. Young*, 4 Term R. 32. But see, as to the effect of an acceptance given to such holder, *Hortsmann v. Henshaw*, 11 How. 177. And see § 629, *supra*.

²⁵² Although made possible by the negligence of the drawer's agent, *Bel-*
(2121)

In like manner, the drawer of a bill or check will not be bound by payment made by the drawee under the forged indorsement of the payee.²⁵³ And the bank which pays a check upon a forged indorsement (except as it is relieved by the recent statute in England) will still be responsible to its depositor, as though no payment had been made.²⁵⁴ And the depositor may recover against the bank, although his pass book has been frequently balanced and returned to him, and even though a period of more than six years elapsed before discovery of the forgery.²⁵⁵

Forged Indorsements.

§ 1469. Where a bank holds a note or bill for collection under a forged indorsement, and collects and pays it over to its principal, it will still be liable to the real owner for the amount collected.²⁵⁶ And if an acceptor pays a bill by check, and afterwards pays the check to one who finds it or holds it under a forged indorsement, it will be no payment of the original bill.²⁵⁷ So, if a bill is indorsed by another person in the payee's name, and paid to the holder under such indorsement, the payee may recover such payment.²⁵⁸ But, under the English statute above referred to, a valid payment may be made by the bank drawn upon, although it knew the sig-

knap v. Bank, 100 Mass. 376; and the drawer cannot therefore recover against the agent for such negligence, Hatton v. Holmes, 97 Cal. 206, 31 Pac. 1131.

²⁵³ Morgan v. Bank, 11 N. Y. 404; Citizens' Nat. Bank v. Importers' & Traders' Bank, 119 N. Y. 196, 23 N. E. 540; Star Fire Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 442; First Nat. Bank v. Pease (Ill. Sup.) 48 N. E. 160; Pickle v. Must, 88 Tenn. 380, 12 S. W. 919. And the drawer may recover the check itself from a third party who has received and paid it under a forged indorsement. U. S. v. National Bank of Republic, 2 Mackey (D. C.) 280.

²⁵⁴ Roberts v. Tucker, 16 Q. B. 575.

²⁵⁵ Bank of British North America v. Merchants' Nat. Bank, 91 N. Y. 106, affirming 48 N. Y. Super. Ct. 1; although five months more elapsed in this case after discovery of the forgery before giving notice or offering to return the check.

²⁵⁶ Arnold v. Bank, 1 C. P. Div. 578; although the payee was himself negligent in forwarding the bill by mail to his indorsee in England.

²⁵⁷ Thompson v. Bank, 82 N. Y. 1.

²⁵⁸ Although the bill was delivered through the post office to the wrong person, Graves v. Bank, 17 N. Y. 205.

nature both of the payee and of the person who forged his name, and was grossly negligent in making the payment.²⁵⁹ If the check is collected, however, by another bank, and paid to a stranger under a forged indorsement, the collecting bank will not be protected (like the drawee) by the statute, but will be liable to the drawer of the check.²⁶⁰

Since an indorsement warrants the genuineness of prior indorsements, payment made by the drawee to an indorser, holding under a forged indorsement, may be recovered from such holder.²⁶¹ Where the drawee of a check pays it under a forged indorsement, and charges the amount to the drawer, and is afterwards notified of the forgery, and obliged by suit to repay the amount to the drawer, it may recover the payment from the holder to whom it was made;²⁶² although the forgery would have been discovered sooner, if the drawer or the bank had taken measures to ascertain the genuineness of the check.²⁶³ On the other hand, no recovery can be had against one who has received payment under a forged indorsement after his position has been changed by delay and his remedy against prior parties lost,* or where he is a mere agent under an indorsement "for collection," and has paid the money over to his principal.†

In general, only reasonable diligence is necessary on the drawer's part in giving notice after discovery of the forgery.²⁶⁴ If notice is

²⁵⁹ *Hare v. Copeland*, 13 Ir. C. L. 426.

²⁶⁰ *Ogden v. Benas*, L. R. 9 C. P. 513. See § 1453, supra.

²⁶¹ *Star Fire Ins. Co. v. New Hampshire Nat. Bank*, 61 N. H. 442; *Onondaga Co. Sav. Bank v. U. S.*, 12 C. C. A. 407, 64 Fed. 703, affirming 39 Fed. 259; *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun, 475, 27 N. Y. Supp. 1070; although the later indorsement is "for collection," *U. S. v. American Exch. Nat. Bank*, 70 Fed. 232. But see, contra, *Northwestern Nat. Bank v. Bank of Commerce of Kansas City*, 107 Mo. 402, 17 S. W. 982.

²⁶² *Carpenter v. Bank*, 123 Mass. 66. So, on a settlement between the bank and the payee. *Levy v. Bank*, 27 Neb. 557, 43 N. W. 354.

²⁶³ Neither of them owing this duty to the holder, notwithstanding a local custom of New York banks, which was held to be inadmissible. *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74.

* *London & River Plate Bank v. Bank of Liverpool* [1896] 1 Q. B. 7.

† *U. S. v. American Exch. Nat. Bank*, 70 Fed. 232; *Vogel v. Ball*, 69 Tex. 604, 7 S. W. 101.

²⁶⁴ *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287.

promptly given to the holder receiving such payment, the money may be recovered from him as a payment made by mistake.²⁶⁵ And even the United States government must give notice, like any other party, within a reasonable time after discovering a forgery of its notes, and, if it fails to do so, it cannot recover payments made by it on such notes.²⁶⁶

²⁶⁵ *Wilkinson v. Johnson*, 3 Barn. & C. 428. And see § 1486, *infra*.

²⁶⁶ *U. S. v. Central Nat. Bank*, 6 Fed. 134.

II. PAYMENT—WHEN MADE AND HOW PROVED.

§ 1470. Payment before Maturity.

- 1471. — Business Hours.
- 1472. — After Maturity.
- 1473. Burden of Proof.
- 1474. Presumption of Payment.
- 1475. — From Possession by Payee.
- 1476. — From Possession by Acceptor—Indorser.
- 1477. — From Receipt.
- 1478. — Indorsed by Mistake.
- 1480. — From Lapse of Time.
- 1481. Circumstantial Evidence.

Payment before Maturity.

§ 1470. Payment of commercial paper should be made at the time it falls due.²⁶⁷ But it may be made before that time or afterwards, and still be valid between the parties to the payment.²⁶⁸ Paper payable on demand may be paid at any time,²⁶⁹ and an indorser of such paper will be liable until demand is made.²⁷⁰ Before maturity the holder is not obliged to receive payment, and it can only be made by his consent.²⁷¹ But, if there is a condition in a note that the maker shall be entitled to interest on all payments made before maturity, it will imply leave to pay before the day named.²⁷² In general, however, payment before maturity is at the risk of the party making it, and constitutes no defense against a subsequent bona fide holder for value before maturity.²⁷³ Some

²⁶⁷ Benj. Chalm. Dig. art. 235; Story, Bills, § 417.

²⁶⁸ Benj. Chalm. Dig. art. 235; Leighton v. Cummings, 89 Ill. 520.

²⁶⁹ Bartrum v. Caddy, 9 Adol. & E. 275, 1 Perry & D. 207; and the maker may pay at any time without demand first made, Stover v. Hamilton, 21 Grat. (Va.) 273.

²⁷⁰ Pardee v. Fish, 60 N. Y. 265.

²⁷¹ 2 Daniel, Neg. Inst. 262; 2 Edw. Bills & N. § 745; Story, Bills, § 417; Ebersole v. Redding, 22 Ind. 232.

²⁷² And a tender before maturity will be a good defense. Crocker v. Green, 54 Ga. 494.

²⁷³ Byles, Bills, 227; Chit. Bills, 448; 2 Daniel, Neg. Inst. 261; 2 Edw. Bills & N. § 744; 2 Para. Notes & B. 214; Story, Bills, § 417; Burbridge v. Manners, 3 Camp. 193; Morley v. Culverwell, 7 Mees. & W. 174; Trustees v. Lewis, 34

foreign statutes provide expressly that the holder need not receive payment of a bill before it is due,²⁷⁴ and that, if payment is made before maturity to an unauthorized holder, it will not discharge the bill.²⁷⁵

If a bill is paid before maturity by the acceptor, and afterwards comes into his possession again, and is held by him at maturity, it will be extinguished.²⁷⁶ But if he purchases it by way of discount, and negotiates it, the indorser will be liable, even to a holder with notice.²⁷⁷

Fla. 424, 16 South. 325; although secured by a collateral mortgage which has not been transferred with the note, *Brayley v. Ellis*, 71 Iowa. 155, 32 N. W. 254. As between assignees of notes secured by different mortgages, each claiming priority, see *Watson v. Wyman*, 161 Mass. 96, 36 N. E. 602. And a bank which pays a postdated check before its date will be liable to the drawer's assignee claiming under an assignment made after the payment and before the date of the check. *Godin v. Bank*, 6 Duer (N. Y.) 76. And this is also true of a formal release before maturity without surrender of the instrument or cancellation. *Dod v. Edwards*, 2 Car. & P. 602. And see §§ 680, 1462, *supra*.

²⁷⁴ ARGENTINE REPUBLIC (Code Com. art. 863); BELGIUM (Code Nap.); BOLIVIA (Code Com. art. 402); CHILI (Code Com. art. 713); COLOMBIA (Code Com. art. 455); COSTA RICA (Code Com. art. 448); ECUADOR (Code Com., as in "Spain"); FRANCE (Code Com. art. 146); GREECE (Code Nap.); HAYTI (Code Nap.); HOLLAND (Exch. Law, art. 159); ITALY (Code Com. art. 231); MEXICO (Code Com. art. 393); NICARAGUA (Code Com. art. 278); PERU (Code Com. art. 455); PORTUGAL (Code Com. art. 380); RUS-SIA (Exch. Law, art. 610); SALVADOR (Code Com. art. 454); SAN DO-MINGO (Code Nap.); SPAIN (Code Com. art. 501); SWITZERLAND (Oblig. R. 760); TURKEY (Code Nap.); URUGUAY (Code Com. art. 881); VENEZUELA (Code Com. art. 60).

²⁷⁵ ARGENTINE REPUBLIC (Code Com. art. 862); BELGIUM (Code Nap.); BOLIVIA (Code Com. art. 400); CHILI (Code Com. art. 714); COLOMBIA (Code Com. art. 449); COSTA RICA (Code Com. art. 442); DENMARK (Exch. Law, § 51); ECUADOR (Code Com., as in "Spain"); FRANCE (Code Com. art. 144); GREECE (Code Nap.); HAYTI (Code Nap.); HOLLAND (Exch. Law, art. 158); ITALY (Code Com. art. 229); MEXICO (Code Com. art. 387); NICARAGUA (Code Com. art. 379); PERU (Code Com. art. 449); RUSSIA (Exch. Law, art. 611); SALVADOR (Code Com. art. 448); SAN DOMINGO (Code Nap.); SPAIN (Code Com. art. 495); TURKEY (Code Nap.); URU-GUAY (Code Com. art. 879); VENEZUELA (Code Com. art. 61).

²⁷⁶ Byles, Bills, 227.

²⁷⁷ Byles, Bills, 227; Benj. Chalm. Dig. art. 235; *Attenborough v. Mackenzie*, 25 Law J. Exch. 244.

Business Hours.

§ 1471. A foreign bill of exchange should be paid on the day of maturity, in business hours.²⁷⁸ But an inland bill (as distinguished formerly from a foreign bill) might be paid at any hour of the day,²⁷⁹ and a sufficient tender might be made about sunset on the day of maturity.²⁸⁰ But, if payment of a bill or note is refused on presentment for payment at any hour on the day of maturity, the holder may at once treat it as dishonored.²⁸¹ In Hungary bills payable at a fair, which lasts one day, must be paid before 4 p. m., and all other bills before noon.²⁸²

Payment after Maturity.

§ 1472. If a bill is paid after presentment and refusal, on the day it matures, it will still be sufficient to discharge the parties.²⁸³ But a tender made after maturity, although before suit, will constitute no defense.²⁸⁴ It was formerly considered, however, that the drawer and indorser were entitled to a reasonable time to pay after dishonor by the acceptor, and might therefore make a suffi-

²⁷⁸ Byles, Bills, 226; Chit. Bills, 448; Colkett v. Freeman, 2 Term R. 61; Parker v. Gordon, 7 East, 385.

²⁷⁹ Chit. Bills, 449; 2 Daniel, Neg. Inst. 262; 2 Pars. Notes & B. 214; notice of protest being generally made on the next day, Leftley v. Mills, 4 Term R. 170; Haynes v. Birks, 3 Bos. & P. 599.

²⁸⁰ Avery v. Stewart, 2 Conn. 69.

²⁸¹ Chit. Bills, 448; 2 Daniel, Neg. Inst. 261; 2 Edw. Bills & N. § 745. And such demand will be sufficient against the drawer, although made at 11 a. m. Ex parte Moline, 1 Rose, 303, 19 Ves. 216. So, of a promissory note. Burbridge v. Manners, 3 Camp. 193.

²⁸² HUNGARY (Exch. Law, § 109).

²⁸³ And such payment will render the notice of dishonor of no effect. Hartley v. Case, 1 Car. & P. 555, 4 Barn. & C. 339, 6 Dowl. & R. 505; and the payor will not be liable, in such case, for the fees of noting, Leftley v. Mills, 4 Term R. 173.

²⁸⁴ Byles, Bills, 227; Chit. Bills, 383, 449; whether made by the acceptor of a bill, Hume v. Peploe, 8 East. 168; Walker v. Barnes, 5 Taunt. 240, 1 Marsh. 36; Dobie v. Larkan, 10 Exch. 776; Poole v. Tunbridge, 2 Mees. & W. 223; or the maker of a note, City Bank v. Cutter, 3 Pick. (Mass.) 414; McCreary v. Newberry, 25 Ill. 496.

cient tender on the day after.²⁸⁵ A tender of the face of the bill after it has become due need not be accepted by the holder.²⁸⁶ But a good tender stops the accruing of further interest.²⁸⁷

In order to have that effect, however, the person making the tender must have been ready, not merely willing, to pay.²⁸⁸ And a plea of tender is of no avail, if the party making it is not still, and has not been always, ready to pay.²⁸⁹ And it is available only in bar of damages and costs, and must be pleaded with a profert of the money.²⁹⁰

Burden of Proving Payment.

§ 1473. The party alleging payment must bear the burden of proving it.²⁹¹ And if he pleads, by way of payment of a certificate of deposit, that he had paid a previous order given for the same debt by the payee of the certificate to another person, he must prove

²⁸⁵ Chit. Bills, 382; *Walker v. Barnes*, 1 Marsh. 36, 5 Taunt. 240; *Soward v. Palmer*, 2 Moore, 274, 8 Taunt. 277.

²⁸⁶ *Huston v. Noble*, 4 J. J. Marsh. (Ky.) 130; but if accepted it is a good payment, *Kilby v. Wilson*, 1 Ryan & M. 178.

²⁸⁷ *Strafford v. Welch*, 59 N. H. 46; notwithstanding an indefinite extension until after one year's notice and a tender without such notice, *Woodruff v. Trapnall*, 12 Ark. 640.

²⁸⁸ *Otis v. Barton*, 10 N. H. 433.

²⁸⁹ Chit. Bills, 382; *Siggers v. Lewis*, 1 Crompt. M. & R. 370, 2 Dowl. 681; *Matthews v. Lindsay*, 20 Fla. 962; *Balme v. Wambaugh*, 16 Minn. 116 (Gil. 106); *Walker v. Brown*, 12 La. Ann. 266.

²⁹⁰ *Caldwell v. Cassidy*, 8 Cow. (N. Y.) 271; *Adams v. Commission*, 44 N. J. Law, 638.

²⁹¹ *Hilton v. Smith*, 5 Gray (Mass.) 400; *Ellison v. Rix*, 85 N. C. 77; *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195; *Van Buskirk v. Chandler*, 18 Neb. 584, 26 N. W. 356. Especially if the note was at the place of payment at its maturity. *Fullerton v. Bank*, 1 Pet. 604. And whether payment has been made or not is a question for the jury. *Smith's Appeal*, supra. Where the indorser of a note holds it as collecting agent for his indorsee, and also holds a second and smaller note, belonging to the maker of the first note, with authority to collect and apply it to the payment of the first note, the burden of proving that he has done so is still on him, although a payment larger than the second note was made by him on the first the day before he collected the second, and the balance on the first note was afterwards paid by the maker, who was presumed to have paid it all. *Shephard v. Calhoun*, 72 Ill. 337.

such payment.²⁹² Payment on a note is an admission of the debt as then due; but, if the time is material, the party making payment must prove when it was made.²⁹³ And, in an action against an indorser, if he pleads payment by the acceptor, and the acceptor paid the bill by mistake for another bill, and the payment was promptly revoked and the acceptance restored, and the other bill surrendered, the holder must establish the fact of the mistake.²⁹⁴

In foreclosure of a collateral mortgage, parol evidence is admissible to show payments on the notes referred to in the mortgage, without producing or accounting for them.²⁹⁵ And, in general, any facts tending to show payment of a note are relevant and admissible.²⁹⁶ But the presumption that an outstanding note is not paid is not changed by evidence that a brother of the maker said he had furnished him with money to pay it,²⁹⁷ or that the payee afterwards received checks sufficient in amount to pay it.²⁹⁸

Presumption of Payment.

§ 1474. A bill or note is presumed to be still unpaid while it is in the possession of the payee²⁹⁹ or his personal representative.³⁰⁰ And if it is alleged that a note was paid, and left by inadvertence in the holder's hands, it will not be sufficient to show that the habits of the payee were generally careless in such matters.³⁰¹ But if a

²⁹² Since it will otherwise be presumed to have been settled and disposed of by the certificate, *Alabama & M. R. R. Co. v. Sanford*, 36 Ala. 703.

²⁹³ *McGehee v. Greer*, 7 Port. (Ala.) 537.

²⁹⁴ *Bogart v. Nevins*, 6 Serg. & R. (Pa.) 361.

²⁹⁵ *Catterlin v. Armstrong*, 79 Ind. 514.

²⁹⁶ *Moran v. Abbey*, 58 Cal. 163. But a promise to pay, made by the principal maker, is not sufficient, as against a surety, to rebut the proof of payment by him. *Kirkpatrick v. Hawk*, 80 Ill. 122.

²⁹⁷ *Walker v. Douglas*, 70 Ill. 445.

²⁹⁸ *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195.

²⁹⁹ *Brembridge v. Osborne*, 1 Starkie, 374; *Davis v. Gaines*, 28 Ark. 440; *Turner v. Turner*, 79 Cal. 565, 21 Pac. 959; *Stiger v. Bent*, 111 Ill. 328; although overdue, *Hamlet v. Bliss*, 55 Vt. 535. In this case the payee held a collateral mortgage also. So, *Stiger v. Bent*, 20 Cent. Law J. 37.

³⁰⁰ *Ritter v. Schenk*, 101 Ill. 387; notwithstanding proof that checks were given, but not indorsed, *Somervall v. Gillies*, 31 Wis. 152.

³⁰¹ *Perry v. Gray*, 106 Mass. 206.

note, after being transferred and dishonored, returns to the possession of the bank, and the bank also holds a check from the maker for the same amount drawn on it and payable to it, it will be presumptive evidence that the note is paid.³⁰² On the other hand, a note will not be presumed to be paid because it is in the maker's possession as administrator of the payee.³⁰³ And, if a note is in the possession of one who is the personal representative both of the payee and the maker, it will be presumed that he holds it on account of the payee's estate, of which he is sole executor, rather than as one of several administrators of the maker.³⁰⁴

Payment Presumed from Possession.

§ 1475. Payment of a bill or note will be presumed from possession after maturity by the party liable on it,³⁰⁵ especially if it is indorsed by the party who claims adversely as holder,³⁰⁶ or is indorsed and canceled.³⁰⁷ So, payment of a note will be presumed, if the maker holds it with a receipt of a later date for the amount

³⁰² *Burns v. Kelley*, 41 Miss. 339.

³⁰³ *Love v. Dilley*, 64 Md. 238, 1 Atl. 59.

³⁰⁴ *Haywood v. Lewis*, 65 Ga. 221.

³⁰⁵ *McGee v. Prouty*, 9 Metc. (Mass.) 547. In such case payment will be presumed to have been made to the person entitled to receive it. *Lipscomb v. De Lemos*, 68 Ala. 592. But see, as to possession acquired, after receiving payment, by gift from the then holder, *Jones v. Benbow* (N. C.) 29 S. E. 774.

³⁰⁶ *Byles, Bills*, 232; *Egg v. Barnett*, 3 Esp. 196; *Tedens v. Schumers*, 112 Ill. 263; *Grimes v. Hillary*, 150 Ill. 141, 36 N. E. 977; *Smith v. Gardner*, 36 Neb. 741, 55 N. W. 245; *Halfin v. Winkleman*, 83 Tex. 165, 18 S. W. 433; *First Nat. Bank v. Harris*, 7 Wash. 139, 34 Pac. 466. And a purchaser from the maker can only recover against the indorser on proof that the note was made for his accommodation, and the want of such proof will not be cured by the verdict. *Callahan v. Bank*, 78 Ky. 604; but not so the possession of a note by the maker as agent for the holder, *Bowman v. St. Louis Times*, 87 Mo. 191; nor possession of a note by the maker before maturity, although it is indorsed by the payee, *Eckert v. Cameron*, 43 Pa. St. 120; *Morris v. Morton*, 14 Neb. 358, 15 N. W. 725; nor where it is shown to have been surrendered to the maker by the unauthorized act of the holder's agent, *Emerson v. Mills*, 83 Tex. 386, 18 S. W. 805.

³⁰⁷ *Egg v. Barnett*, 3 Esp. 196; or stamped "Paid," *Perez v. Bank*, 36 Fla. 467, 18 South. 590; especially where it is corroborated by the debtor's testimony that it was paid, *Peavey v. Hovey*, 16 Neb. 416, 20 N. W. 272.

secured by it, stipulating for a credit on the note.³⁰⁸ Possession of a note by the maker is presumptive evidence of payment, although it is shown that he obtained it from the attorney of the holder, and that the holder had not actually received the money for it.³⁰⁹ So, if a note is found among the maker's papers after his death, it will be presumed to have been paid.³¹⁰ But payment will not be inferred, from the possession of the note by the maker, until it is shown to have been issued and delivered to the payee.³¹¹

Where one of several makers brings suit against the others for contribution, his possession of the note will be evidence, for the purpose of such suit, that he has paid it.³¹² The presumption of payment arising from surrender to the maker or possession by him is not conclusive, but may be rebutted, like other presumptions.³¹³ So, where sale of a note is made by the pledgee, the maker's possession will not amount to evidence of payment (except as to the amount secured to the pledgee), as against a purchaser of the premises mortgaged for its security, who has assumed to pay the note.³¹⁴

Possession by Drawee—Indorser.

§ 1476. If a bill is in the possession of the drawee after its maturity, it is prima facie evidence that it has been paid.³¹⁵ So, a draft, payable to the drawer's own order and not indorsed, will be

³⁰⁸ *Penn v. Edwards*, 50 Ala. 63.

³⁰⁹ *Hollenberg v. Lane*, 47 Ark. 394, 1 S. W. 687, and 23 Cent. Law J. 550.

³¹⁰ *Richardson v. City of Cambridge*, 2 Allen (Mass.) 118; *Liddell v. Wright*, 72 Ga. 899.

³¹¹ *Mygatt v. Pruden*, 29 Ga. 43.

³¹² *Dillenbeck v. Dygert*, 97 N. Y. 303; *McGee v. Prouty*, 9 Metc. (Mass.) 547; *Chandler v. Davis*, 47 N. H. 462; especially where the note had a receipt indorsed (as from the plaintiff) by the bank where it was payable, *Ingram v. Croft*, 7 La. 82. But see, contra, *Bates v. Calne's Estate* (Vt.) 40 Atl. 36.

³¹³ *Fellows v. Kress*, 5 Blackf. (Ind.) 536; e. g. where the maker got possession of the note by fraud, *Arnold v. Crane*, 8 Johns. (N. Y.) 79; or where the note was indorsed and delivered with a release of the collateral mortgage for the purpose of collection, *Allen v. Sawyer*, 88 Ill. 414; or was surrendered for a renewal note then taken, *Potts v. Coleman*, 67 Ala. 221.

³¹⁴ *Zimbleman v. Veeder*, 98 Ill. 613.

³¹⁵ *Gibbon v. Featherstonhaugh*, 1 Starkie, 225. So, of a check, *Wilson v.*

presumed to be paid, if found in the drawee's hands.³¹⁶ But the possession of a bill by the acceptor before maturity raises no such presumption.³¹⁷ After it has been circulated, however, its possession by the acceptor will be presumptive evidence that it is paid,³¹⁸ but that is only upon proof that it has been in circulation.³¹⁹ When an indorser brings suit against the acceptor of a bill, he must prove that he has paid it. But it has been held that possession by him without reindorsement, after subsequent special indorsements, will be sufficient.³²⁰ On the other hand, where a note is made for the accommodation of the payee, and was in his hands and indorsed by him after maturity, it will be presumed to have been paid, in a suit by his indorsee against the maker.³²¹

Payment Proved by Receipt.

§ 1477. A receipt of payment on the bill itself is presumptive evidence of payment by the acceptor or maker.³²² But this is only so where it is in the handwriting of a holder, who was entitled to receive payment.³²³ But, where credits are indorsed on a note without signature or proof of handwriting, it has been held that they may be presumed to have been indorsed by the payee, leaving to the holder the burden of explaining them away.³²⁴ If a note is transferred and delivered by the payee with indorsements of interest on it, not signed, they will be presumed to have been written by him

Goodin, Wright (Ohio) 219; or a canceled check, Conway v. Case, 22 Ill. 127; or a draft, Bell v. Norwood, 7 La. 95; but it may be rebutted, Hill v. Gayle, 1 Ala. 275.

³¹⁶ Connelly v. McKean, 64 Pa. St. 113.

³¹⁷ Witte v. Williams, 8 S. C. 290.

³¹⁸ Baring v. Clark, 19 Pick. (Mass.) 220.

³¹⁹ Byles, Bills, 232; 2 Daniel, Neg. Inst. 256; 2 Pars. Notes & B. 221; Pfiel v. Van Batenburg, 2 Camp. 439; Curry v. Kurtz, 33 Miss. 29. But see, contra, Bell v. Norwood, 7 La. 95.

³²⁰ Norris v. Badger, 6 Cow. (N. Y.) 449. But see, contra, Gorgerat v. McCarty, 2 Dall. 144.

³²¹ Blenn v. Lyford, 70 Me. 149.

³²² Byles, Bills, 233; 2 Edw. Bills & N. § 785; 2 Pars. Notes & B. 221; Scholey v. Walsby, Peake, 34.

³²³ Chitt. Bills, 478; Pfiel v. Van Batenburg, 2 Camp. 439; Curry v. Kurtz, 33 Miss. 29.

³²⁴ Brown v. Gooden, 16 Ind. 444; Bell v. Campbell, 123 Mo. 1. 25 S. W. 359.

at the time they bear date.³²⁵ A part payment, indorsed in the handwriting of the payee, is admissible as evidence of payment against him or his indorsee.³²⁶ And the date of an indorsement of payment, made at the time of the payment, is evidence of the time when it was made.³²⁷ But a receipt in full, written across the face of a note without any date, will be presumed to have been written at the time of the last payment indorsed on the note.³²⁸

Payment may also be proved by a separate receipt in full given by an agent, although the note stipulated on its face, "No credit allowed unless indorsed on the note at the time of payment."³²⁹ A receipt of payment indorsed on a bill may be explained by parol.³³⁰ And even recitals in a deed are only *prima facie* evidence of payment of the consideration for which a note is given.³³¹ But a receipt on account of a bond, for the exact amount due, cannot be lightly questioned by circumstantial evidence after the lapse of more than 20 years.³³²

§ 1478. — When a memorandum of payment of interest is indorsed on a note, it will be evidence of a payment on account of the note, and, if made within six years, will be presumptive evidence that the principal was then unpaid.³³³ But in New Jersey the indorsement of payment on a bill or note, by or for the party receiving it, is not sufficient proof of payment to take the note out of the statute of limitations.³³⁴ But such indorsement by a deceased hold-

³²⁵ *Smith v. Battens*, 1 Moody & R. 341.

³²⁶ *Addams v. Seitzinger*, 1 Watts & S. (Pa.) 243.

³²⁷ *Clapp v. Hale*, 112 Mass. 368; *Pears v. Wilson*, 23 Kan. 343. But see, contra, *Shaffer v. Shaffer*, 41 Pa. St. 51.

³²⁸ *Chapman v. Smoot*, 66 Md. 8, 5 Atl. 462.

³²⁹ *Howe Mach. Co. v. Simler*, 59 Ind. 307.

³³⁰ *Chit. Bills*, 478; 2 Daniel, Neg. Inst. 258; 2 Edw. Bills & N. § 786; *Scholey v. Walsby*, Peake, 24; *Swain v. Frazier*, 35 N. J. Eq. 326; or it may be identified by the plaintiff with a payment already credited by him, *Robertson v. Garahwiller*, 81 Ind. 463.

³³¹ *Lazell v. Lazell*, 12 Vt. 443. So, a receipt indorsed on the margin of the record of a collateral mortgage may be rebutted. *Patch v. King*, 29 Me. 448.

³³² *Robert v. Garnie*, 3 Caines (N. Y.) 14.

³³³ *Purdon v. Purdon*, 10 Mees. & W. 562. But such indorsement is not evidence of the payment unless indorsed before the statute ran out. *Young v. Alford*, 118 N. C. 215, 23 S. E. 973.

³³⁴ *Parker v. Butterworth*, 46 N. J. Law, 244; *Revision*, p. 596, § 11. But (2133)

er is available as an admission against interest, without proof of actual payment made, it being a question for the jury whether the payment was actually made.³³⁵ And, in Minnesota, it is provided by statute that such indorsement shall be prima facie evidence of the facts stated, when made against the interest of the holder.³³⁶

On the other hand, where part payment has been made and not indorsed on a note, the want of such receipt will not be regarded as fatal, upon an application to vacate the sale of collateral mortgaged premises made under a power of sale to satisfy the note.³³⁷ And, where a bill is taken up by an indorser, it is not necessary to indorse a receipt on the bill; and the bill may be proved in bankruptcy against the drawer without such indorsement.³³⁸

Payment Indorsed by Mistake.

§ 1479. Where a note is marked "Paid" by mistake, and the indorser is notified of it before the close of banking hours, it will not discharge the note.³³⁹ So, if a check is marked "Received payment," according to the custom of a bank which marked in this way all checks that were to be presented to other banks, such mark may be explained by parol evidence to that effect.³⁴⁰ But if a check is credited to the holder, and stamped "Paid," it cannot afterwards be charged back to him.* And if the payee transfers a note in trust,

such indorsement, if corroborated, may be considered sufficient to go to the jury. So, in Arkansas, an indorsement, "See entry Jan. 30, cr. by \$95." in the handwriting of the former receiver of the bank payee, the actual receiver knowing nothing about the payment or on what account it was made. *Alston v. Bank*, 9 Ark. 455. In South Carolina, such indorsement is prima facie evidence of payment, but it is a question for the jury whether it was made in order to take the note out of the statute. *Gibson v. Peebles*, 2 McCord, 418.

³³⁵ *Risley v. Wightman*, 13 Hun (N. Y.) 163.

³³⁶ MINNESOTA (Gen. St. § 5752).

³³⁷ *Lake v. Brown*, 116 Ill. 83, 4 N. E. 773.

³³⁸ *Palmer v. Blight*, 2 Wash. C. C. 96, Fed. Cas. No. 10,684.

³³⁹ *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438; the clearing house rule not being available. So, *Carley v. Bank* (Tenn. Ch. App.) 46 S. W. 328.

³⁴⁰ *Scott v. Betts, Hill & D.* (N. Y.) 363.

* *American Exch. Nat. Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839; although it had not been charged up to the drawer.

and takes it up at the expiration of the trust without canceling his indorsement, he may bring suit as a purchaser against the maker, although the note was canceled by mistake and marked "Paid."³⁴¹ And if the maker's name is canceled, and the note marked "Paid by mistake," but the mistake is corrected as "Canceled in error," before the note is returned to the indorsing bank, the collecting agent will not be liable as having received payment.³⁴² And where a bill is accepted payable at a given place, with direction to apply to another house in case of need, and the party so referred to cancels the acceptance by mistake, supposing it to be payable at his house, and afterwards writes on the bill "Canceled by mistake," and pays it for the honor of the indorsers, they may recover against a prior indorser on proof that the cancellation was by mistake.³⁴³ So, where advances were made by A. to the drawer of several bills of exchange drawn against a bill of lading, and the drawer furnished further collateral to A. on the dishonor of the first of the bills, and A. settled with the drawee on the dishonor of the last of them (by means of a judicial sale of the goods consigned, which resulted in the bills of exchange being canceled and delivered up to the drawee, leaving a balance still due to A. for his advances), he was entitled to hold the collateral as security for such advances, notwithstanding the formal cancellation of the bills and the possible injury to the drawer thereby.³⁴⁴ And if an acceptance is canceled, and marked "Canceled by mistake," it will not discharge an indorser's liability to his indorsee.³⁴⁵

Presumption from Lapse of Time.

§ 1480. A demand note will be presumed to have been paid after the lapse of 20 years.³⁴⁶ And the length of time elapsed since an

³⁴¹ *McLemore v. Hawkins*, 46 Miss. 715.

³⁴² *Prince v. Bank*, 3 App. Cas. 325.

³⁴³ *Raper v. Birkbeck*, 15 East, 17.

³⁴⁴ *Yglesias v. Bank*, 3 C. P. Div. 60.

³⁴⁵ Although, in a suit brought by the indorser in France against his indorsers (and also against the indorsee, by way of injunction), the drawer and indorsers were declared to be discharged by English law, because the remedy was suspended, *Novelli v. Rossi*, 2 Barn. & Adol. 757.

³⁴⁶ *Duffield v. Creed*, 5 Esp. 52; 3 & 4 Wm. IV. c. 42; *Pattie v. Wilson*, 25 Kan. 326; although the statute of limitations had not run, because of the non-

alleged payment may be considered with other evidence by a jury in determining whether it was made.³⁴⁷ If a payment is proved to have been made in a certain year, it will be presumed to have been made on the last day of the year, in the absence of other proof as to the date.³⁴⁸ And where, after suit brought, there are subsequent settlements of account between the holder, indorser, and maker, they are admissible as evidence of payment for the consideration of the jury.³⁴⁹

But the inference of payment arising from mere lapse of time is not sufficient to overcome positive evidence that a note has not been paid.³⁵⁰ And there is no such presumption from lapse of time against an alien enemy.³⁵¹ So, the presumption may, in general, be rebutted by proof of a subsequent parol acknowledgment of the debt.³⁵²

Circumstantial Evidence of Payment.

§ 1481. Payment of a bill or note may be proved without actual production of the paper;³⁵³ and it may be shown by circumstantial evidence.³⁵⁴ So, the holder may be estopped from denying pay-

residence of the maker, *Bean v. Tonnele*, 94 N. Y. 381; *Courtney v. Staudenmayer*, 56 Kan. 392, 43 Pac. 758; or although the payee had died after holding the paper 8 years, and no administrator was appointed for 21 years, *Sheldon v. Heaton*, 22 App. Div. 308, 47 N. Y. Supp. 1124. So, if a note has been lost for 18 years, *Peabody v. Denton*, 2 Gall. 351, Fed. Cas. No. 10,867; but a note will not be presumed to have been paid after a lapse of five years, *Nash v. Gibson*, 16 Iowa, 305; or from the neglect to present it until time enough had passed to outlaw it, *Smith's Appeal*, 52 Mich. 415, 18 N. W. 195.

³⁴⁷ *Manning v. Meredith*, 69 Iowa, 430, 29 N. W. 336.

³⁴⁸ E. g. a payment proved to have been made 16 years before, *Byers v. Fowler*, 14 Ark. 86.

³⁴⁹ *Williams v. Barrett*, 52 Iowa, 637, 3 N. W. 690.

³⁵⁰ *Delaney v. Brunette*, 62 Wis. 615, 23 N. W. 22; and delay to sue until the statute had nearly run out raises no presumption of payment, *Newcombe v. Fox*, 1 App. Div. 389, 37 N. Y. Supp. 294.

³⁵¹ *Du Belloix v. Lord Waterpark*, 1 Dowl. & R. 16.

³⁵² *Fisher v. Phillips*, 4 Baxt. (Tenn.) 243.

³⁵³ *Shearm v. Burnard*, 10 Adol. & E. 593.

³⁵⁴ E. g. a sale of other property for the purpose and a contemporaneous statement of payor as to his purpose, *Planters' Bank v. Massey*, 2 Heisk. (Tenn.) 360; or satisfaction of a collateral trust deed on the record, *Minter v. Cupp*, 98 Mo. 26, 10 S. W. 862. As to the admissibility of an agreement that

ment, if he informs a surety that the principal has paid, and the surety neglects on that account to take proceedings for several years, and is damaged by the delay.³⁵⁵ And this has been held to be so, if the holder of a note secured by trust deed represents to the purchaser of the land that his note has been paid, although he was induced to make the representation by fraud.³⁵⁶

In like manner, proof of payment is often unnecessary. Thus, where a partnership is dissolved and its assets transferred to one partner, and the other afterwards receives and converts a draft of the partnership to his own use, he will be liable for conversion without proof that the draft has been paid.³⁵⁷ And payment is sufficiently proved as to all the makers by judgment to that effect in favor of one in a joint action of trover brought by them against the payee for retaining the note after it was paid.³⁵⁸

§ 1482. — Payment to a collecting agent cannot be proved, without producing the bill itself, by showing that he received it for collection, and delivered it to his bankers, and received credit for a bill for the same amount.³⁵⁹ So, an entry to the credit of a depositor's personal account is not sufficient proof of payment by him as executor.³⁶⁰ And it has been held that the fact that an action is barred on the note by the statute of limitations is not such evidence of payment as will entitle the maker to a transfer of land, which was conditioned on the payment of the note.³⁶¹ Whether the circumstances show or establish a payment is a question of fact; and the presumption is against the alleged payment, where the bill was not produced at the time, and bears no mark of payment, and the books of the parties show no memorandum of the fact.³⁶² If a note is taken up by the holder at the surety's request, and is de-

a balance due from the holder to the maker should operate as payment, see *Roche v. Kempt*, 33 U. C. Q. B. 387.

³⁵⁵ Although such information was given in good faith, *Whitaker v. Kirby*, 54 Ga. 277.

³⁵⁶ *Staats v. Bigelow*, 2 MacArthur (D. C.) 367.

³⁵⁷ *Bullard v. Hascall*, 25 Mich. 132.

³⁵⁸ *Spencer v. Dearth*, 43 Vt. 98.

³⁵⁹ *Atkins v. Owen*, 4 Nev. & Man. 123, 2 Adol. & E. 35.

³⁶⁰ *Scholey v. Walton*, 12 Mees. & W. 510.

³⁶¹ *Cook v. Reynolds*, 58 Miss. 243. But see, contra, *Jordan v. Fountain*, 51 Ga. 332.

³⁶² *Hankin v. Squires*, 5 Biss. 186, Fed. Cas. No. 6,025.

livered to the surety to enable him to make proof of claim in bankruptcy against the maker, but is never actually paid to the holder, the surety will not be discharged by such apparent payment.³⁶³ In an action by a pledgee against his pledgor, payment to the latter is admissible to disprove an alleged payment to the pledgee by the agent who collected the note.³⁶⁴

If it appears, from payment of interest, that the note was not paid, the presumption may be rebutted by showing that the interest was paid by mistake.³⁶⁵ So, an alleged payment by the acceptor of a bill may be avoided, on the ground that the money belonged to his assignee and could not be so appropriated.³⁶⁶ On the other hand, the pecuniary circumstances of the maker and holder are not admissible as evidence from which a payment may be inferred.³⁶⁷ So, an allegation that individual checks were given in payment on behalf of the drawer's firm cannot be supported by evidence of other similar payments for the firm in other business.³⁶⁸ Neither can it be shown by parol evidence that a stock certificate, described in a note as collateral, was to be regarded as payment, if the note was not paid at maturity.³⁶⁹

³⁶³ *North Bridgewater Sav. Bank v. Soule*, 129 Mass. 528.

³⁶⁴ *Lockhart v. Fessenich*, 58 Wis. 588, 17 N. W. 302.

³⁶⁵ *Ritter v. Schenk*, 101 Ill. 387.

³⁶⁶ *Pritchard v. Hitchcock*, 6 Man. & G. 151.

³⁶⁷ *Daby v. Ericsson*, 45 N. Y. 786; *Alexander v. Dutcher*, 7 Hun, 439.

³⁶⁸ *Howe v. Whitehead*, 130 Mass. 268.

³⁶⁹ *Perry v. Bigelow*, 128 Mass. 129.

III. RECOVERY OF PAYMENT.

§ 1483. Recovery for Mistake.

1485. — For Fraud—Illegality.

1486. — For Forgery.

Payment by Mistake.

§ 1483. A payment once made cannot, of course, be recovered by force.³⁷⁰ But, in general, one who pays a bill by mistake may recover the amount at law from the party receiving it;³⁷¹ a demand from the defendant being a prerequisite to such recovery.³⁷² So, if a bill is accepted by mistake and afterwards paid by the acceptor, it is recoverable as a payment made by mistake.³⁷³ And, if payment is made by a note for a larger amount than is actually due, an action lies, after the note is given, to recover the excess.³⁷⁴

Where a bank pays an overdraft by mistake, the presumption is that the drawer had funds sufficient to meet the draft, and the burden of proof is on the bank to show an error in its account.³⁷⁵ But where such payment is made by a bank through the negligence of its own officer, without investigating the depositor's account, it has been held that it cannot recover the payment from an innocent holder to whom it was made.³⁷⁶ So, where a note payable

³⁷⁰ *Chambers v. Miller*, 32 L. J. C. P. 30; *Pollard v. Bank*, L. R. 6 Q. B. 623.

³⁷¹ *Byles, Bills*, 258; *Benj. Chalm. Dig. art. 237*; 2 *Daniel, Neg. Inst.* 253; 2 *Edw. Bills & N.* § 741; 1 *Pars. Notes & B.* 246; *Mills v. Guardians of Poor*, 3 *Exch.* 590; *U. S. v. National Park Bank*, 6 *Fed.* 852; *Munroe v. Bonanno*, 16 *App. Div.* 421, 45 *N. Y. Supp.* 61. But payment made by an accommodation indorser cannot be recovered back as damages, because of a verbal contemporaneous agreement made by the holder with the maker to surrender the note if the maker would give a new note and mortgage. *Gardner v. Mathews*, 81 *Mo.* 627.

³⁷² *Southwick v. Bank*, 84 *N. Y.* 420.

³⁷³ *Kendal v. Wood*, L. R. 6 *Exch.* 243.

³⁷⁴ And giving the note is sufficient payment to sustain a recovery of the excess, *Whitcomb v. Williams*, 4 *Pick. (Mass.)* 231; although the payment is less than the amount of a collateral note held as security, *Hunt v. Nevers*, 15 *Pick. (Mass.)* 500.

³⁷⁵ *Bank of U. S. v. Washington*, 3 *Cranch, C. C.* 295, *Fed. Cas. No.* 940.

³⁷⁶ *Boylston Nat. Bank v. Richardson*, 101 *Mass.* 287; nor from the payee.

at a bank is certified and paid by it under a misapprehension as to the state of the maker's account, the payment so made cannot be recovered.³⁷⁷

Where a collecting bank forwards a note for collection to its correspondent, and afterwards pays the amount to its customer (supposing that the note had been paid to the correspondent, because no notice had been received to the contrary), it may recover the amount from the person receiving it.³⁷⁸ And where payment is made by an indorser to his indorsee on the nonacceptance of the first part of a bill, but after payment of the second part by the drawee without notice to such indorser, he may recover the amount as paid by mistake.³⁷⁹ So, a collecting agent, who pays to his employer by crediting him with the amount, on the supposition that the note had been paid to his agent, may recover from the customer on the ground of mistake; although his mistake was due to want of notice of dishonor to him caused by his not having indorsed for collection, and although the holder himself received no notice of dishonor, because the first agent had failed to give the holder's address to his correspondent.³⁸⁰

§ 1484. — Even where the payment is made by a party who has been discharged without his knowledge by the laches of the holder, he may recover the payment on the ground of mistake;³⁸¹ especially where such mistake was occasioned by a misstatement in the certificate of protest to the effect that the demand had been

First Nat. Bank v. Devenish, 15 Colo. 229, 25 Pac. 177. So, where the drawee bank receives and credits to a depositor the overdraft of another depositor, and subsequently pays other overdrafts of the same depositor, it will be liable to the depositor of the check as for cash received. *Oddie v. Bank*, 45 N. Y. 735. So, where the drawee bank fails to return the check through the clearing house within the time fixed by its rules. *Preston v. Bank*, 23 Fed. 179. And see, as to estoppel, § 1872, *infra*.

³⁷⁷ *Riverside Bank v. First Nat. Bank*, 20 C. C. A. 181, 74 Fed. 276.

³⁷⁸ *Bank of Orleans v. Smith*, 3 Hill (N. Y.) 560; both banks being agents of the defendant, and competent to give notice of nonpayment to the drawer and indorsers, *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518; but the sub-agent whose false report of payment and credit to his employer (the original collecting bank) has led the latter to settle with the principal, cannot recover from his employer, *Deutsche Bank v. Berfro*, 73 Law T. (N. S.) 669.

³⁷⁹ *Durkin v. Cranston*, 7 Johns. (N. Y.) 442.

³⁸⁰ *East Haddam Bank v. Scovil*, 12 Conn. 303.

³⁸¹ *Milnes v. Duncan*, 6 Barn. & C. 671; *Garland v. Bank*, 9 Mass. 408.

properly made.³³² And, if the drawer pays a bill under such mistake, the amount may be recovered by the owner for his use, from the collecting agent, whose negligence occasioned the mistake.³³³ But it has been held that an accommodation drawer, who pays without having received legal notice of dishonor, cannot recover, because the payment was a voluntary one.³³⁴

One who pays a note by mistake may recover, in a proper case, if he gives prompt notice on the day he discovers the mistake, although he had canceled the indorsement by such mistake.³³⁵

Where a mistake (in paying the wrong bill) was not discovered for two weeks, it was held that there could be no recovery.³³⁶ And if the acceptor pays a bill to one holding by indorsement under an insufficient power of attorney, which the acceptor had examined and had means of knowing to be insufficient, he cannot recover, by reason of his own negligence.³³⁷ And if the maker voluntarily pays a note after claiming a reduction, which was refused, he cannot recover the reduction claimed.³³⁸ So, if the holder of a note collects a collateral government bond in gold, and applies it to the payment of the note, the maker cannot recover the difference between the value of the gold and other legal tender.³³⁹

There can be no recovery of a payment made by mistake of law;³⁴⁰ e. g. where damages on re-exchange were claimed and paid

³³² *Talbot v. Bank*, 129 Mass. 67.

³³³ *Merchants' Bank v. Bank of Commerce*, 24 Md. 12.

³³⁴ *Sleigh v. Sleigh*, 19 Law J. Exch. 345.

³³⁵ *Wilkinson v. Johnson*, 3 Barn & C. 428.

³³⁶ *Davis v. Watson*, 2 Nev. & M. 709. And where the mistake is made by the bank taking up a bill as the indorser's agent, the indorser must look to the bank, and cannot recover the payment from the holder of the bill because of the want of privity between them. *Rogers v. Kelly*, 2 Camp. 123.

³³⁷ *East India Co. v. Tritton*, 3 Barn. & C. 280.

³³⁸ *Sessions v. Meserve*, 46 N. H. 167. In general, a voluntary payment cannot be recovered, e. g. to a holder whose want of title appeared by the form of indorsement, *Boyer v. Richardson*, 52 Neb. 156, 71 N. W. 981; or by one guarantor of the share of his co-guarantor, *Gay v. Ward*, 67 Conn. 147, 34 Atl. 1025; or by an indorser who knew he was discharged from liability, *Oil-Well Supply Co. v. Exchange Nat. Bank*, 131 Pa. St. 100, 18 Atl. 935.

³³⁹ *Hancock v. Insurance Co.*, 114 Mass. 155.

³⁴⁰ *Bytes, Bills*, 234; 2 *Daniel*, Neg. Inst. 254; *Kitchen v. Hawkins*, L. R. 2 Q. P. 22; *Rogers v. Ingham*, 3 Ch. Div. 351.

in excess of what the law required.³⁹¹ So, where a surety pays the note to one who purchased it after maturity, on being informed that he was liable, he cannot recover on the ground of mistake, although the note was actually paid by the principal maker before its transfer, and that fact was not known either to the purchaser or the surety.³⁹²

Recovery for Fraud—Illegality.

§ 1485. One who is induced to pay by fraud may recover the payment so made.³⁹³ This is so where a drawee pays a check drawn without funds to one who knew that the drawer was then insolvent and that the check was postdated.³⁹⁴ So, where a note is paid to the payee before its maturity, and is afterwards transferred to a bona fide holder, and is paid by the maker to such holder, he may recover the amount of such payment from the payee.³⁹⁵

If a usurious rate of discount is charged by a bank, and deducted from the credit given, the usurious interest may be recovered from the bank.³⁹⁶ So, if a note is given for an illegal consideration, e. g. to compound a felony, and the maker is obliged to pay it to a bona fide holder, he may recover against the payee.³⁹⁷ So, a payment may sometimes be recovered on an express agreement for its repayment.³⁹⁸

³⁹¹ Bank of U. S. v. Daniel, 12 Pet. 32.

³⁹² Petrie v. Feeter, 21 Wend. (N. Y.) 172. So, where the administrator of the principal made an excessive payment, supposing himself to be a surety, he cannot have contribution as such against the actual surety. Proudfoot v. Clevenger, 33 W. Va. 267, 10 S. E. 394.

³⁹³ Byles, Bills, 234; Chit. Bills, 273; Bell v. Buckley, 11 Exch. 631; Braithwaite v. Bain, 66 Minn. 325, 69 N. W. 4. He must show that he was ignorant of the fraud at the time of making the payment. Baldwin v. Foss, 71 Iowa, 389, 32 N. W. 389. On the other hand, if a bank is induced by the depositor's fraud to receive forged checks and credit him with the amount, it cannot recover payments made to a bona fide holder in discharge of his checks. Nassau Bank v. National Bank of Newburgh, 32 App. Div. 268, 52 N. Y. Supp. 1118.

³⁹⁴ Martin v. Morgan, 3 Moore, 635.

³⁹⁵ Connecticut & Passumpsic R. Co. v. Newell, 31 Vt. 364.

³⁹⁶ Nash v. Bank, 68 N. Y. 396. As to recovery of usurious payments, see *infra*, where usury is considered as matter of defense.

³⁹⁷ Although he could not recover, if the payment was voluntary, Haynes v. Rudd, 17 Hun (N. Y.) 477.

³⁹⁸ Alexander v. Strong, 9 Mees. & W. 733.

Payment, made by an insolvent or bankrupt in violation of the statute, may be recovered by his assignee.³⁹⁹ But payment by a bankrupt, made in good faith and not for the purpose of a fraudulent preference, is now permitted in England.⁴⁰⁰ Under the United States Bankrupt Law of 1867, it was held that drawing a check for the payment of a note held by the bank shortly before its maturity was not a payment in contemplation of the drawer's bankruptcy (which followed a few days afterwards), but merely an adjustment of mutual debts, and therefore valid.⁴⁰¹ So, in England, the application of bank notes, which were the proceeds of bills fraudulently negotiated by a bankrupt, and were used to take up another bill drawn by him, was held to be a mere exchange of securities, and therefore not recoverable as a payment by the bankrupt in violation of the act.⁴⁰²

But one who is himself in fault cannot recover. Thus, if the maker of a note, given for a fraudulent consideration to induce the payee to join in a bankruptcy composition, is compelled to pay it to a bona fide holder, he cannot recover the amount from the payee.⁴⁰³ So, if the acceptor pays a bill at the drawer's request (and not as directed in the bill) to an agent of the holder, who paid it over to his principal, he cannot recover the amount from the agent in an action for deceit, on proof that the agent did not inform him of facts as to demand and dishonor which discharged the drawer.⁴⁰⁴ So, if a bill is paid by the acceptor's agent without being surrendered, and the acceptor, after demanding a return of the money or the bill, takes from the holder a receipt with a guaranty against damage if the bill should be presented again, he thereby waives his right to proceed against the payee for the recovery of the money paid.⁴⁰⁵

³⁹⁹ 7 Geo. IV. c. 32; Chit. Bills, 444.

⁴⁰⁰ 6 Geo. IV. c. 16, § 82; 2 & 3 Vict. c. 29; Chit. Bills, 443; and the former of these acts has been held to be retrospective, *Terrington v. Hargreaves*, 5 Bing. 489.

⁴⁰¹ *Hough v. Bank*, 4 Biss. 349, Fed. Cas. No. 6,721.

⁴⁰² *Lowndes v. Anderson*, 13 East, 130.

⁴⁰³ *Solinger v. Earle*, 82 N. Y. 303.

⁴⁰⁴ *Johnson v. Bank*, 5 Rob. (N. Y.) 554.

⁴⁰⁵ *Alexander v. Strong*, 9 Mees. & W. 733.

Recovery for Forgery.

§ 1486. Payment made on a forged instrument by mistake may be recovered from the party receiving it,⁴⁰⁶ although paid to a holder in possession before actual maturity.⁴⁰⁷ The government may, in like manner, recover payments made on forged treasury notes.⁴⁰⁸ But it has been held that a maker, who pays a forged note to a bona fide holder, should have known his own signature, and cannot, therefore, recover the payment made.⁴⁰⁹ And this is true of a bank which pays its own notes that have been raised, and fails to return them promptly,⁴¹⁰ or pays forged notes purporting to be its own, and keeps them for some time in its vaults without further examination, although it knew of other frauds practiced in its notes of issue.⁴¹¹ But if a bank certifies a check, and, after it has been raised, pays it to another bank, and charges it to the drawer, and the alteration is afterwards discovered by the drawer when his account is written up, the payment may be recovered by the bank, which is only bound to know the drawer's signature and not the body of the instrument.⁴¹² And this is so, although the drawee had before refused to pay the check because the holder was not identified, and had afterwards informed the holder to whom it was credited that it was good.⁴¹³

⁴⁰⁶ 1 Edw. Bills & N. 276; 2 Pars. Notes & B. 599; *Gombossy v. Kalz*, 18 Misc. Rep. 350, 41 N. Y. Supp. 411. So, a payment made in ignorance of a material alteration, *Fraker v. Little*, 24 Kan. 598; *Eckert v. Pickel*, 59 Iowa. 545, 13 N. W. 708.

⁴⁰⁷ *Welch v. Goodwin*, 123 Mass. 71.

⁴⁰⁸ *Cooke v. U. S.*, 12 Blatchf. 43, Fed. Cas. No. 3,178; or on a check paid by it on a forged indorsement, *U. S. v. Clinton Nat. Bank*, 28 Fed. 357.

⁴⁰⁹ The maker being chargeable in such case with his own negligence, *Johnston v. Bank*, 27 W. Va. 343.

⁴¹⁰ *United States Bank v. Bank of Georgia*, 10 Wheat. 333; *Gloucester Bank v. Salem Bank*, 17 Mass. 33.

⁴¹¹ *Gloucester Bank v. Salem Bank*, 17 Mass. 33; the bank having failed five days after payment, the notes remaining in its vaults for six weeks without notice to the party from whom they came.

⁴¹² *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211.

⁴¹³ And although the alteration was not detected until 30 days after payment. *City Bank v. First Nat. Bank*, 45 Tex. 203. He cannot recover (2144)

Where a bank pays a check that has been raised, it may recover the amount paid.⁴¹⁴ So, if the drawee pays a forged check to another bank in the same city, relying (according to bank custom) on the holder's diligence, without examining the check, and returning it promptly on discovery of the forgery, it may recover from the bank which received the money and was guilty of negligence in purchasing the check.⁴¹⁵ So, if the drawee's agent pays a bill without obtaining it, because it was then in a notary's hands, upon an agreement of the notary's clerk to send it around the same day, and the drawee afterwards, on seeing the bill next day, discovers the forgery, and promptly demands repayment, he may recover.⁴¹⁶ So, the drawee who pays a check, which has been indorsed and deposited and presented through the clearing house, may afterwards sue the indorser on his implied warranty, upon discovering the forgery, when the check was repudiated by the drawer.⁴¹⁷ And notwithstanding an agreement to credit checks in payment of clearing-house balances, subject to correction, if the paper proved not to be genuine on inspection, a bank may recover a payment made on a forged certificate, and not discovered until after business hours, if it has been guilty of no negligence.⁴¹⁸

§ 1487. — But the drawee is required to know the drawer's signature, and cannot, therefore, in general, recover a payment made by him to the bona fide holder of a forged draft.⁴¹⁹ And if he pays to a bona fide holder a bill with a forged bill of lading at-

against a mere collecting agent, who held the draft under an indorsement "for collection," and has paid over the amount. *National Park Bank v. Seaboard Nat. Bank*, 114 N. Y. 28, 20 N. E. 632; *National City Bank v. Westcott*, 118 N. Y. 468, 23 N. E. 900. But, aliter, if not paid over. *United States Nat. Bank v. National Park Bank*, 50 Hun, 495, 13 N. Y. Supp. 411.

⁴¹⁴ *White v. Bank*, 64 N. Y. 316; or the excess paid above the original sum drawn. *Oppenheim v. Bank (Sup.)* 50 N. Y. Supp. 148.

⁴¹⁵ *Ellis v. Trust Co.*, 4 Ohio St. 628.

⁴¹⁶ *Goddard v. Bank*, 4 N. Y. 147, affirming 2 Sandf. (N. Y.) 247.

⁴¹⁷ *National Bank of North America v. Bangs*, 106 Mass. 441.

⁴¹⁸ *Allen v. Bank*, 50 N. Y. 12.

⁴¹⁹ *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Deposit Bank of Georgetown v. Fayette Nat. Bank*, 90 Ky. 10, 13 S. W. 339; *Germania Bank v. Bontell*, 60 Minn. 189, 62 N. W. 327; *First Nat. Bank of Marshalltown v. Marshalltown State Bank (Iowa)* 77 N. W. 1045. But delay in discovering

tached, in ignorance of the forgery, he cannot recover.⁴²⁰ So, if the drawee of a check pays it through the clearing house, it cannot recover the payment on discovery of the forgery.⁴²¹ The giving of bank credit is a payment, and the amount cannot be recovered back on discovery of the forgery some months afterwards, although the holder had been guilty of negligence in purchasing the check of a stranger.⁴²² And, even where the forgery is discovered the same day, it has been held that the bank, which paid the check by crediting the holder, cannot recover.⁴²³ So, if an acceptor pays a forged bill of exchange, he cannot recover the payment from the holder who received it.⁴²⁴ In like manner, the acceptor's banker should know his signature, and cannot recover a payment made on a forged acceptance.⁴²⁵

Where, however, a forged bill is paid to one who indorses it, and thereby warrants its genuineness, recovery may be had on his indorsement.⁴²⁶ But where a bank pays a forged check to another bank, which indorsed it, and which had previously on the same day refused payment of another check deposited with it by the same depositor and discovered later in the day to be a forgery, and had

the forgery and repudiating the charge of such check to it by a corresponding bank does not render the drawee bank liable. *First Nat. Bank v. First Nat. Bank*, 151 Mass. 290, 24 N. E. 44. And the drawee is not bound to know the indorser's signature. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. 739.

⁴²⁰ *Hoffman v. Bank*, 12 Wall. 181.

⁴²¹ *Commercial & Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11.

⁴²² *Bank of St. Albans v. Farmers' & Mechanics' Bank*, 10 Vt. 141.

⁴²³ *Levy v. Bank*, 1 Bin. (Pa.) 27.

⁴²⁴ *Byles, Bills*, 339; 2 *Daniel, Neg. Inst.* 254; *Price v. Neal*, 3 *Burrows*. 1354, 1 *W. Bl.* 390. As to effect of acceptance, see § 629, *supra*.

⁴²⁵ *Benj. Chalm. Dig. art.* 237; *Chlt. Bills*, 442; *Smith v. Mercer*, 6 *Taunt.* 76, 1 *Marsh.* 453; *Pooley v. Brown*, 11 *C. B. (N. S.)* 566.

⁴²⁶ *Lennon v. Grauer*, 2 *App. Div.* 513, 38 *N. Y. Supp.* 22; *Third Nat. Bank of City of New York v. Merchants' Nat. Bank*, 76 *Hun*, 475, 27 *N. Y. Supp.* 1070; *Rouvant v. Bank*, 63 *Tex.* 610; *People's Bank v. Franklin Bank*, 88 *Tenn.* 299, 12 *S. W.* 716; *First Nat. Bank v. State Bank*, 22 *Neb.* 769, 36 *N. W.* 289; or even an indorsement "Without recourse," *Ware v. McCormack*, 96 *Ky.* 139, 28 *S. W.* 157, 959. And see §§ 752, 1468, *supra*. But see, *contra*, *Germania Bank v. Bontell*, 60 *Minn.* 189, 62 *N. W.* 327. But stamping a draft "Paid" before surrender is not equivalent to indorsement. *Vogel v. Ball*, 69 *Tex.* 604, 7 *S. W.* 101.

failed to disclose these circumstances to the bank paying the check, the payment may be recovered.⁴²⁷

Notice of Forgery.

§ 1488. Payment of a forged check cannot be recovered, where the party paying neglects to give notice after discovering the forgery, and the party receiving payment is injured by losing his opportunity of recourse and indemnity.⁴²⁸ Many English cases hold that notice must be given upon the same day on which the forgery is discovered.⁴²⁹ But if one pays a bill for the indorser's honor upon a forged indorsement, and gives notice the same day immediately after discovering the forgery and in time for notice of dishonor to prior indorsers, he can recover.⁴³⁰ The same rule controls the government as a holder, and it cannot recover after neglecting for several months to give notice of the forgery of the indorsement on which it made the payment.⁴³¹ One who receives counterfeit bank notes may, in like manner, recover the amount for which they were taken,⁴³² although they were not presented and discovered to be counterfeit until the next day.⁴³³ But, where a bank which has received such notes fails to return them to the depositor for two months after discovering the forgery, it cannot recover.⁴³⁴ So, where such notes are taken by an agent for goods sold, and are

⁴²⁷ *First Nat. Bank of Quincy v. Ricker*, 71 Ill. 439.

⁴²⁸ 2 Pars. Notes & B. 598; but not, if the holder is not damaged. *Oppenheim v. Bank* (Sup.) 50 N. Y. Supp. 148.

⁴²⁹ *Byles, Bills*, 234, 339; *Chit. Bills*, 481; *Story, Bills*, § 451; *Cocks v. Masterman*, 9 Barn. & C. 902; *Jones v. Ryde*, 5 Taunt. 488, 1 Marsh. 157; *Bruce v. Bruce*, 5 Taunt. 405. note, 1 Marsh. 165; *Boyd v. Emmerson*, 2 Adol. & E. 184, 4 Nev. & M. 99; *Kilsby v. Williams*, 5 Barn. & Ald. 815, 1 Dow. & R. 476; *Mather v. Maldstone*, 18 C. B. 273. In this last case the acceptance itself was forged, and it was paid by the drawee after inspecting the signature. See remarks of Cowen, J., as to the strictness of the English rule, in *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 291.

⁴³⁰ *Wilkinson v. Johnson*, 3 Barn. & C. 428, 5 Dowl. & R. 403.

⁴³¹ *U. S. v. Central Nat. Bank of Philadelphia*, 6 Fed. 134.

⁴³² *Keene v. Thompson*, 4 Gill & J. (Md.) 463.

⁴³³ *Young v. Adams*, 6 Mass. 182.

⁴³⁴ *Pindall v. Bank*, 7 Leigh (Va.) 617. So, too, *Samuels v. King*, 50 Ind. 527.

immediately recognized by the principal to be counterfeit, but are not returned for several months.⁴³⁵ But, if the forgery is not discovered for a long time by the purchaser of a note, he may recover the purchase money paid, if he has used due diligence, however long the time may have been.⁴³⁶

The diligence required is in giving notice after discovery, not in making discovery.⁴³⁷ In Pennsylvania, express provision is made by statute for recovery by an indorsee of the consideration paid to an indorser on a forged instrument.⁴³⁸ In the larger cities the question of diligence is controlled to some extent by bank and clearing-house rules. But failure to return a check within the precise time fixed by such rules, by reason of a mistake, which caused a brief delay without injury to the holder, has been held not to prevent a recovery.⁴³⁹ The subject of payment to one who holds under a forged indorsement has been already considered in a previous part of this chapter.⁴⁴⁰ The question of liability for forged paper, on the part of one who transfers it with or without indorsement, has also been considered in an earlier chapter.

⁴³⁵ *Raymond v. Baar*, 13 Serg. & R. (Pa.) 318.

⁴³⁶ *Frank v. Lanier*, 91 N. Y. 112. But see *U. S. v. Clinton Nat. Bank*, 28 Fed. 357. On the other hand, even a few days' delay, if due to the drawee's negligence, with a change of position in the meantime by the party receiving the payment, will prevent recovery against him. *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 Pa. St. 46, 28 Atl. 195.

⁴³⁷ *Thlrd Nat. Bank v. Merchants' Nat. Bank*, 76 Hun, 475, 27 N. Y. Supp. 1070. As to estoppel by negligence in discovery, see § 1782, *infra*.

⁴³⁸ PENNSYLVANIA (Purd. Dig. p. 222, § 10; also *Id.* p. 1733, § 8).

⁴³⁹ *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281; *Merchants' Nat. Bank v. Nat. Bank of Commonwealth*, 139 Mass. 513, 2 N. E. 89.

⁴⁴⁰ See § 1468, *supra*.

IV. APPROPRIATION OF PAYMENT.

§ 1489. Appropriation by Debtor.

1490. — Implied.

1491. — Effect.

1492. Appropriation by Creditor.

1494. — By Law.

1495. — To Oldest Items.

1496. — To Debts not Due.

1497. — To Interest—Not Principal.

1498. — To Debts Barred by Limitation.

1499. — To Lawful Debts.

1501. — To Individual and Joint Debts.

1502. — To Secured Debts.

1503. — To Debts with Surety.

1505. — To Bills and Other Debts.

1506. Notes Secured by Collateral Mortgage.

1507. Collateral Claimed by General Creditors.

Application by Debtor.

§ 1489. The ordinary rules of application of payment hold good, in general, as to payment of commercial paper. The debtor making the payment has, in the first instance, the right to designate how it shall be applied.⁴⁴¹ This is true, of course, only in the case of voluntary payments.⁴⁴² The application should be made by him at the time of making the payment,⁴⁴³ and it has been held that this must be so.⁴⁴⁴ But the general rule seems to be that he may

⁴⁴¹ Byles, Bills, 229; 2 Daniel, Neg. Inst. 275; 2 Pars. Notes & B. 222; Upham v. Lefavour, 11 Metc. (Mass.) 174; Wendt v. Ross, 33 Cal. 650; Clarke v. Scott, 45 Cal. 86; Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537. So, a payment by a third person, under agreement with the maker, must be applied as directed by him. Ellis v. Allen, 48 Vt. 545. But the application cannot be changed after the maker's death and after a note is barred, so as to give effect to the agreement that it might be applied to that note. Coon's Appeal, 52 Conn. 188.

⁴⁴² 2 Daniel, Neg. Inst. 275; 2 Pars. Notes & B. 222.

⁴⁴³ 2 Edw. Bills & N. § 755; 2 Pars. Notes & B. 222; Thayer v. Denton, 4 Mich. 192; Howland v. Rench, 7 Blackf. (Ind.) 236; Calvert v. Carter, 18 Md. 73; Crisler v. McCoy, 33 Miss. 445; Irwin v. Paulett, 1 Kan. 418.

⁴⁴⁴ Haynes v. Waite, 14 Cal. 446; Long v. Miller, 93 N. C. 233.

make it at the time of payment or at any time before it is done by the creditor.⁴⁴⁵ And it has been said that he may make the appropriation, as between himself and the creditor, at any time before suit, but that he must do so within a reasonable time, as between himself and other interested parties.⁴⁴⁶

Some express word or act is necessary, and a mere intention, not communicated to the creditor, will be of no effect.⁴⁴⁷ And the agreement of the maker with the payee has been held not to be enough without specific direction to the agent through whom the payment is made.⁴⁴⁸

Implied Appropriation by Debtor.

§ 1490. The application of the payment to a particular debt may be implied and proved by circumstances.⁴⁴⁹ Thus, if the debtor owes two bonds, and pays a sum exactly equal in amount to one of them, it will be inferred that he intended the payment for that one.⁴⁵⁰ And the appropriation may be shown by another contract between the same parties.⁴⁵¹ Where the maker had two notes in the bank with different indorsers, and made a payment, saying that A.'s note fell due first and it was for B.'s accommodation, and he would make B. pay it, it was held to show an appropriation to that note, although, in fact, the other note matured first.⁴⁵²

If A. makes advances to B. on a special consignment, and B. draws his bill on A. on the general account, and the advances are charged to that account, and the bill is dishonored at maturity, it is a question for the jury whether such course of dealing excludes the consignment from the general account.⁴⁵³ So, where advances were

⁴⁴⁵ *Huffman v. Cauble*, 86 Ind. 591; *Bell v. Bell*, 20 S. C. 34.

⁴⁴⁶ 2 Daniel, Neg. Inst. 276; 2 Pars. Notes & B. 224.

⁴⁴⁷ *Long v. Miller*, 93 N. C. 233; *Davis Sewing Mach. Co. v. Buckles*, 89 Ill. 237; *Banco De Lima v. Anglo-Peruvian Bank*, 8 Ch. Div. 160.

⁴⁴⁸ *Horne v. Bank*, 32 Ga. 1.

⁴⁴⁹ *Chit. Bills*, 455; 2 *Edw. Bills & N.* § 757; 2 *Pars. Notes & B.* 222; *Mitchell v. Dall*, 4 Gill & J. (Md.) 361; *Howland v. Rensch*, 7 Blackf. (Ind.) 236.

⁴⁵⁰ *Robert v. Garnie*, 3 Calnes (N. Y.) 14.

⁴⁵¹ *Stone v. Talbot*, 4 Wis. 463. So, by a parol agreement to pay out of a particular fund. *McGuffey v. Johnson*, 9 Lea (Tenn.) 555.

⁴⁵² *West Branch Bank v. Moorehead*, 5 Watts & S. (Pa.) 542.

⁴⁵³ *Cumming v. Shand*, 29 L. J. Exch. 129.

made to A. to purchase rosin, under an agreement that he should pay by a bill drawn against it, and the purchaser shipped the rosin to C. and drew a bill in favor of the seller, notifying C. of it and requesting him to protect it, and C. applied the rosin to an old account against A., and refused to accept the bill, it was held to be a question for the jury whether sending the draft in such letter to C. amounted to an instruction to him to apply the rosin upon the draft by the custom of merchants.⁴⁵⁴

Appropriation by Debtor—Effect.

§ 1491. In applying a payment the debtor may prefer the principal of his debt to the interest.⁴⁵⁵ But if he directs it to be applied on a note, and expressly refuses to pay the damages, it cannot be applied by the creditor on account of the damages.⁴⁵⁶ So, the debtor may apply the payment to a note which is secured, although the creditor had another note which was not secured.⁴⁵⁷ Or he may apply it to a note in preference to an open account.⁴⁵⁸ But when funds of a depositor have been applied by a bank to a note held by it, made by him individually, he cannot direct a change, and have the credit applied to another note not charged in his general account, but drawn by him in an official capacity.⁴⁵⁹ Where a payment is appropriated at the time by the consignor to the debt of a third party, and he is notified of it, the consignor cannot afterwards change, and apply the same payment to a debt of the consignee.⁴⁶⁰

If the debtor makes an appropriation of the payment, it will bind his surety as well.⁴⁶¹ And, on the other hand, an appropriation

⁴⁵⁴ *Bank of New Hanover v. Williams*, 79 N. C. 129. But see *Keller v. Orr*, 106 Ind. 406.

⁴⁵⁵ *Pindall's Ex'r v. Bank*, 10 Leigh (Va.) 484; *Tooke v. Bonds*, 29 Tex. 419.

⁴⁵⁶ *Runyon v. Latham*, 27 N. C. 551.

⁴⁵⁷ *Robinson v. Doolittle*, 12 Vt. 256; *City Discount Co. v. McLean*, L. R. 9 C. P. 692; and irrespective of the fact that some of the bills were guarantied and that the guarantor was not a party.

⁴⁵⁸ *Champenois v. Fort*, 45 Miss. 355; but not after a different application by the creditor, *Marshall v. Sloan*, 26 Ark. 513.

⁴⁵⁹ *National Mahaiwe Bank v. Peck*, 127 Mass. 298.

⁴⁶⁰ *Hankey v. Hunter, Peake*, Add. Cas. 107.

⁴⁶¹ *Allen v. Jones*, 8 Minn. 202 (Gil. 172).

made by the debtor may be enforced in favor of his creditor, in disregard of a different agreement between the creditor and the surety.⁴⁶²

If a remittance is made to a bank on account of an acceptance payable at the bank, it cannot be afterwards applied by the bank to another account of the sender.⁴⁶³ And, if a payment is appropriated by the bank to the wrong bill, it will be liable, in general, to the holder of the bill, which should have been paid.⁴⁶⁴ In like manner, the acceptor will be liable to the holder for misappropriating the payment by the drawer from the purpose designated by him to another acceptance for the drawer's accommodation, which he was obliged to pay.⁴⁶⁵

Application by Creditor.

§ 1492. If the payment is not appropriated by the debtor, it may be applied by the creditor.⁴⁶⁶ But he cannot appropriate the payment in a manner to injure the debtor.⁴⁶⁷ His right to make such application is not lost by failure to exercise it immediately.⁴⁶⁸ He may do so at any time before suit,⁴⁶⁹ and without further notice

⁴⁶² *Trentman v. Fletcher*, 100 Ind. 105.

⁴⁶³ *Johnson v. Robarts*, 10 Ch. App. 505.

⁴⁶⁴ *Chit. Bills*, 446; *Rogers v. Kelly*, 2 Camp. 123.

⁴⁶⁵ *Patty v. Milne*, 16 Wend. (N. Y.) 557.

⁴⁶⁶ *Chit. Bills*, 453; 2 Daniel, Neg. Inst. 276; 2 Edw. Bills & N. § 755; 2 Pars. Notes & B. 223; *Mayor of Alexandria v. Patten*, 4 Cranch, 317; *Mitchell v. Dall*, 4 Gill & J. (Md.) 361; *Washington Bank v. Prescott*, 20 Pick. (Mass.) 339; *Howland v. Rench*, 7 Blackf. (Ind.) 236; *Middleton v. Frame*, 21 Mo. 412; *Waterman v. Younger*, 49 Mo. 413; *Fargo v. Buell*, 21 Iowa, 292; *McFarland v. Lewis*, 3 Ill. 344; *Davis Sewing Mach. Co. v. Buckles*, 89 Ill. 237; *Wendt v. Ross*, 33 Cal. 650; *Calvert v. Carter*, 18 Md. 73; *Crisler v. McCoy*, 33 Miss. 445; *Holmes v. Pratt*, 34 Ga. 558; *Fargo v. Jennings*, 8 S. D. 99, 65 N. W. 433. So, the holder's agent may apply it with his consent, under an original authority or subsequent ratification. *Willis v. White*, 73 N. C. 484. But the creditor cannot receive the payment and refuse to apply it as directed by the debtor. *Wetherell v. Joy*, 40 Me. 325. So, where the money is furnished and the application directed by the surety, and it is actually paid over by the principal, who assents to the misapplication. *Reed v. Boardman*, 20 Pick. (Mass.) 441.

⁴⁶⁷ 2 Pars. Notes & B. 224; *Bonnell v. Wilder*, 67 Ill. 327.

⁴⁶⁸ *Mayor of Alexandria v. Patten*, 4 Cranch. 317.

⁴⁶⁹ *Byles, Bills*, 230; *Chit. Bills*, 456; *Haynes v. Waite*, 14 Cal. 446.

than the suit itself.⁴⁷⁰ It should be made, however, within a reasonable time.⁴⁷¹

If the creditor receives a general payment on account of two debts, which are secured by different liens, he cannot appropriate it at the time of trial to a lien which he had in the meantime suffered to expire.⁴⁷² When the appropriation has once been made by the creditor, it cannot be changed.⁴⁷³ But such an appropriation, made without the knowledge or consent of the debtor, is not *prima facie* such a new promise on his part as will stop the running of the statute of limitations.⁴⁷⁴

§ 1493. — The creditor in appropriating a payment may prefer a simple debt to a specialty.⁴⁷⁵ Or he may apply a payment on two bonds, which are both due;⁴⁷⁶ or to the last maturing of two acceptances, although the drawers are different persons.⁴⁷⁷ Under the bank custom of applying a customer's money to the payment of his notes at their maturity, a bank will not be liable to the maker, if it applies a deposit (which was made without specific directions and after the dishonor of one note for want of funds) to a note which matured two days later; and the indorser of the first note cannot set up that it was paid by the deposit.⁴⁷⁸

⁴⁷⁰ *Simson v. Ingham*, 2 Barn. & C. 65; *Haynes v. Waite*, 14 Cal. 446. But a private memorandum is not sufficient. *Chit. Bills*, 456; 2 *Edw. Bills & N.* § 761; 2 *Pars. Notes & B.* 223; *Simson v. Ingham*, *supra*.

⁴⁷¹ *McDaniel v. Barnes*, 5 Bush (Ky.) 183.

⁴⁷² *Harker v. Conrad*, 12 Serg. & R. 301.

⁴⁷³ 2 *Daniel*, *Neg. Inst.* 277; 2 *Edw. Bills & N.* § 755; 2 *Pars. Notes & B.* 224, 226; *Sweeney v. Pratt*, 70 Conn. 274, 39 Atl. 182. If it is collateral bills to be collected, they are not to be applied, and do not constitute payment until so collected. *Hatch v. Hutchinson*, 64 Ark. 119, 40 S. W. 578.

⁴⁷⁴ *Byles*, *Bills*, 231. Especially where the payment was indorsed after the statute of limitations had barred the note and in the holder's own interest, and had been applied when received, three years before, to a book account between holder and indorser, although made by a debtor of the maker to the holder on account of the note under an agreement that he might apply it to the book account. *Coon's Appeal*, 52 Conn. 186.

⁴⁷⁵ *Chit. Bills*, 454; *Manning v. Western*, 2 Vern. 606; *Peters v. Anderson*, 5 Taunt. 597; or to several notes *pro rata*, *Young v. Alford*, 118 N. C. 215, 23 S. E. 973; or to a judgment, *Brazier v. Bryant*, 2 Dowl. 477.

⁴⁷⁶ *Smith v. Screven*, 1 McCord (S. C.) 368.

⁴⁷⁷ *McCune v. Belt*, 45 Mo. 174.

⁴⁷⁸ *National Bank of Newburgh v. Smith*, 5 Hun (N. Y.) 183.

And the creditor may apply a general payment to a note which is not in suit rather than to one which is, if both are due,⁴⁷⁹ but he cannot apply it to a note which is not yet due.⁴⁸⁰ If he receives a general payment on several notes, after transferring one of them without recourse, he may apply the payment to those retained by him.⁴⁸¹ So, if he has deposited one check and holds others (which have been dishonored without his knowledge), a general payment made to him by the drawer may be credited on the latter.⁴⁸²

Application by Law.

§ 1494. When neither party appropriates the payment, it will be applied by law according to principles of justice, regard being had to the presumed intention of the parties.⁴⁸³ And it has been said that the law will make the appropriation to the debt which is most burdensome to the debtor, e. g. to one which bears interest, where the other does not.⁴⁸⁴ If the payment is made on a running account, it will be applied to the oldest items,⁴⁸⁵ an *earlier* legal debt being preferred to a *later* equitable one.⁴⁸⁶ And a surety may insist on the application of such payment to the oldest items.⁴⁸⁷

⁴⁷⁹ Allen v. Kimball, 23 Pick. (Mass.) 473. And appropriation to a note not in suit, maturing the day the payment was made, may be shown by taking judgment on the other note already in suit. Bobe v. Stickney, 36 Ala. 482.

⁴⁸⁰ 2 Daniel, Neg. Inst. 276; 2 Edw. Bills & N. § 755; 2 Pars. Notes & B. 227.

⁴⁸¹ Briggs v. Williams, 2 Vt. 283.

⁴⁸² The other check having been lost by the bank and no notice given. Shipsey v. Bank, 59 N. Y. 485.

⁴⁸³ 2 Daniel, Neg. Inst. 277; 2 Edw. Bills & N. § 758; 2 Pars. Notes & B. 227, 231; Lingle v. Cook, 32 Grat. (Va.) 262.

⁴⁸⁴ Byles, Bills, 229; 2 Edw. Bills & N. § 757; 2 Pars. Notes & B. 229.

⁴⁸⁵ Byles, Bills, 230; Chit. Bills, 455; 2 Daniel, Neg. Inst. 277; 2 Edw. Bills & N. § 759; 2 Pars. Notes & B. 230; Mills v. Fowkes, 5 Bing. N. C. 461; U. S. v. Kirkpatrick, 9 Wheat. 720; Sheppard v. Steele, 43 N. Y. 52, 3 Lans. (N. Y.) 417; Thurlow v. Gilmore, 40 Me. 378; Shedd v. Willson, 27 Vt. 478; Wendt v. Ross, 33 Cal. 650; Scott v. Cleveland, 33 Miss. 447; Smith v. Loyd, 11 Leigh (Va.) 512; Sprague v. Hazenwinkle, 53 Ill. 419; Harrison v. Johnston, 27 Ala. 445; Howard v. McCall, 21 Grat. (Va.) 205; McKenzie v. Nevius, 22 Me. 138.

⁴⁸⁶ Chit. Bills, 454; Goddard v. Hodges, 1 Cromp. & M. 33.

⁴⁸⁷ Jones v. U. S., 7 How. 681.

Where there are two attachments on a note in favor of different plaintiffs, a general payment made to the attorney must be applied to the earlier attachment.⁴⁸⁸ So, where several installments are due on a bond, a general payment should be applied to the one that matured first.⁴⁸⁹ And if the debtor owes several notes, which are all due and all dated on the same day, the payment should be applied to principal and interest of that which matured first before paying the interest on the later one.⁴⁹⁰

Application to Oldest Items.

§ 1495. The rule applying payments on an account to the earliest items will be followed,⁴⁹¹ irrespective of the fact that some of the items are secured by a guaranty and others not,⁴⁹² or by a lien.⁴⁹³ In Indiana it is said that the law will appropriate a payment to the oldest item or the most precarious.⁴⁹⁴ And the oldest items in a partnership account are preferred, although the firm has been changed, during the running of the account, by the death or retirement of a partner;⁴⁹⁵ or by dissolution;⁴⁹⁶ or by the incoming

⁴⁸⁸ *Carpenter v. Goin*, 19 N. H. 479.

⁴⁸⁹ *Seymour v. Sexton*, 10 Watts (Pa.) 255. But the creditor may apply the proceeds of collateral sold to any matured installment of the note secured. *Draper v. Mann*, 117 Mass. 439; *Saunders v. McCarthy*, 8 Allen (Mass.) 42.

⁴⁹⁰ *Miller v. Leflore*, 32 Miss. 634.

⁴⁹¹ So, as to application of collateral, *Thompson v. Bank*, 113 N. Y. 325, 21 N. E. 57; but several notes will be treated as one and reduced pro rata, where they grow out of one transaction, *Eyle v. Catholic Church*, 36 La. Ann. 310; and especially if they are written on one paper, and not severed, *Sanborn v. Cole*, 63 Vt. 590, 22 Atl. 716.

⁴⁹² The later item being unsecured, *Strange v. Lee*, 3 East, 484; *Hargroves v. Cooke*, 15 Ga. 321; the later item being secured, *Kirby v. Duke of Marlborough*, 2 Maule & S. 18. So, although payment of the oldest item relieves a surety. *Blackmore v. Granbery*, 98 Tenn. 277, 39 S. W. 229.

⁴⁹³ *Worthley v. Emerson*, 116 Mass. 374.

⁴⁹⁴ *King v. Andrews*, 30 Ind. 429.

⁴⁹⁵ *Clayton's Case*, 1 Mer. 604.

⁴⁹⁶ *Jackson v. Johnson*, 11 Hun (N. Y.) 509; *Fairchild v. Holly*, 10 Conn. 175. So, a partnership note taken up by the payee after dissolution, and charged by consent to the account of the continuing partner, will be extinguished, if reached by a general payment on the account, and the retiring partner will be discharged. *Allcott v. Strong*, 9 Cush. (Mass.) 323.

of a new partner.⁴⁹⁷ And a payment may be applied by the debtor to an old partnership account, although it is credited, by the party receiving it, to a subsequent individual account against the same debtor.⁴⁹⁸

Application to Debts not Due.

§ 1496. A bank cannot apply the deposits of its customer to a debt which has not yet become due.⁴⁹⁹ So, the proceeds of goods in the hands of a consignee, who has accepted bills for the consignor's accommodation, cannot be appropriated by him to such paper as has not matured, other acceptances being due.⁵⁰⁰ And the law will appropriate a payment to debts which are due, and not to those that are not due.⁵⁰¹ So, if a demand note is intended for a continuing security, a deposit subsequently made cannot be applied by the holder to satisfy it.⁵⁰²

If, however, payment is expressly made on a note which is not yet due, it will be appropriated by law to the principal of the note.⁵⁰³ But where a note is made by A. and B., payable in installments, and is only due in part, and the same holder has another note indorsed by A. alone to secure his share of the first note, a payment made by him will be applied to installments not due on that note rather than to other installments in discharge of B.'s share of the first note.⁵⁰⁴

Application to Interest.

§ 1497. A payment is to be appropriated to interest first, and afterwards to principal due.⁵⁰⁵ And some statutes provide expressly

⁴⁹⁷ *Geake v. Jackson*, 36 Law J. C. P. 108; *Morgan v. Tarbell*, 28 Vt. 498.

⁴⁹⁸ *Sherwood v. Haight*, 26 Conn. 432.

⁴⁹⁹ *Jordan v. Bank*, 74 N. Y. 467.

⁵⁰⁰ *Parks v. Ingram*, 22 N. H. 283.

⁵⁰¹ *Cloney v. Richardson*, 34 Mo. 370; *Donally v. Wilson*, 5 Leigh (Va.) 329; *Bobe v. Stickney*, 36 Ala. 482; *Bacon v. Brown*, 1 Bibb (Ky.) 334; *Byrne v. Grayson*, 15 La. Ann. 457.

⁵⁰² *Pease v. Hirst*, 10 Barn. & C. 122.

⁵⁰³ *Starr v. Richmond*, 30 Ill. 276.

⁵⁰⁴ *Shaw v. Pratt*, 22 Pick. (Mass.) 305.

⁵⁰⁵ 2 Daniel, Neg. Inst. 277; 2 Pars. Notes & B. 228; *Frazier v. Hyland*, (2156)

for application of partial payments in the first instance to interest.⁵⁰⁶ If the interest is payable in annual installments, which are then funded and draw interest, a payment will be applied first to interest installments which are due and the interest accrued on them, then to interest accrued on the principal since the last installment, and finally to the principal.⁵⁰⁷ Payments on a note will be applied, in like manner, first to interest, and then to the principal.⁵⁰⁸ If the payment is made before the paper matures, it will be applied to the interest only, if it does not exceed it, and, if it exceeds the interest accrued, then to the principal and interest.⁵⁰⁹ So, where dividends are received from the several estates of the acceptor and indorser of a bill, they will be applied first to the interest and then to the principal.⁵¹⁰ Where the principal is not due, and the interest is due, the payment will, of course, go first to satisfy the interest.⁵¹¹

But the debtor may appropriate the payment, in his discretion, to the principal rather than the interest.⁵¹² And if money is received from several different makers of a joint and several note, under an agreement to apply it to their shares, it will be applied

1 Har. & J. (Md.) 98; *Stewart v. Stebbins*, 30 Miss. 66; *Howard v. McCall*, 21 Grat. (Va.) 205; *Lash v. Edgerton*, 18 Minn. 210 (Gil. 210); *McFadden v. Fortier*, 20 Ill. 509; *Anderson v. Perkins*, 10 Mont. 154, 25 Pac. 92.

⁵⁰⁶ ALABAMA (Code, § 1753); MISSISSIPPI (Ann. Code, § 2351); VERMONT (V. S. § 2302). And if the annual interest is capitalized, as in Vermont, payments are applicable first to the simple interest, then to the interest on interest, and lastly to the principal. Id. § 2303.

⁵⁰⁷ *Anketel v. Converse*, 17 Ohio St. 11; *Vaughan v. Kennan*, 38 Ark. 114. If no interest is due, it will be applied to the principal, *Ross v. Rees* (Ky.) 43 S. W. 215; but only after paying all accrued interest, *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514.

⁵⁰⁸ *Merchants' Bank v. Freeman*, 15 Hun (N. Y.) 359; *Hampton v. Dean*, 4 Tex. 455; *Hearn v. Cutberth*, 10 Tex. 216.

⁵⁰⁹ *De Bruhl v. Neuffer*, 1 Strob. (S. C.) 426; *Hart v. Dorman*, 2 Fla. 445, overruling *Houston v. Crutcher*, 31 Miss. 51.

⁵¹⁰ *In re Joint Stock Discount Co.*, L. R. 10 Eq. 11.

⁵¹¹ *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Spres v. Hamot*, 8 Watts & S. (Pa.) 17. So, on a bond and mortgage. *Righter v. Stall*, 3 Sandf. Ch. (N. Y.) 608.

⁵¹² *Miller v. Trevillian*, 2 Rob. (Va.) 1. And, if he does so to its entire extinguishment, it will extinguish the accrued interest. *Peck v. Association*, 21 Misc. Rep. 84, 46 N. Y. Supp. 1042.

pro rata to principal and interest, rather than to the interest due on the whole note.⁵¹³

Debts Barred by the Statute of Limitations.

§ 1498. In general, a payment will not be applied to a debt which is barred by the statute of limitations, if there is any other debt to apply it to.⁵¹⁴ And, even though a payment is made to be credited "on some of the claims held by you," it cannot be applied to a bond which is outlawed, so as to take it out of the statute.⁵¹⁵ So, if a payment is made generally on several notes, it cannot be applied in part to one, which was already barred, unless it exceeds the amount of the others.⁵¹⁶ But where personal property is transferred to pay certain notes, it will be applicable to all, including those which are barred by the statute.⁵¹⁷ And payments may be applied to items that are about to become barred, so as to save the statute.⁵¹⁸ So, a creditor may appropriate payment on an account to interest, in order to take the items out of the statute.⁵¹⁹ And he may appropriate it to a note which is not barred rather than to one which is, and thereby take it out of the statute.⁵²⁰

Application to Lawful Debts.

§ 1499. In making an appropriation of payment the law always prefers a lawful to an unlawful debt;⁵²¹ or an absolute debt to a

⁵¹³ Donaldson v. Cothran, 60 Ga. 603.

⁵¹⁴ Byles, Bills, 231; 2 Daniel, Neg. Inst. 278; Pond v. Williams, 1 Gray (Mass.) 630. But see, contra, where all are on one sheet and not severed. Sanborn v. Cole, 63 Vt. 590, 22 Atl. 716.

⁵¹⁵ Armistead v. Brooke, 18 Ark. 521.

⁵¹⁶ State Bank v. Woody, 10 Ark. 638.

⁵¹⁷ Taylor v. Foster, 132 Mass. 30.

⁵¹⁸ Robinson's Adm'r v. Allison, 36 Ala. 525; Taylor v. Coleman, 20 Tex. 772.

⁵¹⁹ Worthington v. Grimsditch, 7 Q. B. 479.

⁵²⁰ Nash v. Hodgson, 6 De Gex, M. & G. 474.

⁵²¹ Byles, Bills, 231; Chit. Bills, 455; 2 Pars. Notes & B. 231; Wright v. Laing, 3 Barn. & C. 165; e. g. to the original note, where one who had assumed the maker's debt had made the payment by mistake on a renewal, which the payee had fraudulently diverted to his own use without surrender of the original, Commercial Bank v. MacDougall & Southwick Co., 8 App. Div. 1, 40 N. Y. Supp. 189.

debt that is merely collateral.⁵²² The creditor may apply the payment to an equitable debt,⁵²³ or to an unstamped bill;⁵²⁴ but not to a debt which the debtor has declared that he would not pay "until compelled by law."⁵²⁵

It has been held that the payment should be applied to illegal items, which are due and not objected to, rather than to legal items, which are not due.⁵²⁶ If it has been appropriated by the debtor to a claim which is not a legal one, it cannot afterwards be changed without consent.⁵²⁷ But, if the application is made by the creditor, it must be to a lawful claim, e. g. not to one which is usurious.⁵²⁸ Thus, it should be applied to the principal of a debt which is lawful rather than to the usurious interest agreed on.⁵²⁹ If one of two debts is unlawful for usury, and the other not, the debtor may apply the payment to the former, but the creditor is not at liberty to do so.⁵³⁰ But if a payment is made generally on a usurious note secured by mortgage, and its collection is not prohibited by law for usury, it will be presumed that the payment was to be so applied.⁵³¹

§ 1500. — If an account is made up of illegal items (e. g. for the sale of liquor), and others that are legal, payment will be applied to the latter.⁵³² But where two notes are given, and one is in part for an uncollectible and unlawful liquor account, the creditor may apply the payment to that note.⁵³³ And it has been held that a payment, made on a general account, may be applied to such

⁵²² *Bank of Portland v. Brown*, 22 Me. 205.

⁵²³ *Bosanquet v. Wray*, 6 Taunt. 597, 2 Marsh. 319.

⁵²⁴ *Biggs v. Dwight*, 1 Man. & R. 308.

⁵²⁵ *Tayloe v. Sandiford*, 7 Wheat. 13. But see *Byles, Bills*, 221; *Williams v. Griffith*, 5 Mees. & W. 300.

⁵²⁶ *Caldwell v. Wentworth*, 14 N. H. 431.

⁵²⁷ *Hubbell v. Flint*, 15 Gray (Mass.) 550.

⁵²⁸ *Brown v. Lacy*, 83 Ind. 436; *Smith v. Coopers*, 9 Iowa, 376; *Parchman v. McKinney*, 12 Smedes & M. (Miss.) 631; *Greene v. Tyler*, 39 Pa. St. 361.

⁵²⁹ *Duncan v. Helm*, 22 La. Ann. 418; *Stanley v. Westrop*, 16 Tex. 200.

⁵³⁰ *Rohan v. Hanson*, 11 Cush. (Mass.) 44. But see, contra, as against the debtor himself, *Rackley v. Pearce*, 1 Kelly (Ga.) 241.

⁵³¹ *Gill v. Rice*, 13 Wis. 549.

⁵³² *Solomon v. Dreschler*, 4 Minn. 278 (Gil. 197); *Hilton v. Burley*, 2 N. H. 193.

⁵³³ *Cruickshank v. Rose*, 1 Moody & R. 100, 5 Car. & P. 19.

items for liquor sold, although the payment amounts to more than those items and is less than the other items of the account.⁵³⁴

If the debtor has received a discharge in bankruptcy, of which the creditor had no notice, a payment on general account may be applied to items preceding the discharge.⁵³⁵ On the other hand, if the creditor holds two notes of the debtor with different indorsers, although one of the indorsers is bankrupt, the payment by the maker must be applied pro rata to the two notes.⁵³⁶

But the holder of a note may apply the proceeds of a collateral mortgage to installments, as to which the indorser was discharged by want of notice.⁵³⁷

Individual and Joint Debts.

§ 1501. Where the creditor holds two debts, on one of which the debtor is alone liable and on the other of which he is liable as a joint maker or as a principal debtor with a surety, a payment made by the debtor will be applied to his individual debt first.⁵³⁸ In this respect the common law is said to be unlike the civil law, considering the interest of the creditor, and therefore appropriating the payment to the debtor's individual note rather than to a joint note.⁵³⁹

So, where the holder of two such notes is secured by a collateral mortgage, and the proceeds are not sufficient to cover both notes, the holder is not obliged to apply them to the two pro rata, but may appropriate them entirely to the individual note.⁵⁴⁰ And, when a creditor has once made an appropriation in that way, he cannot afterwards change it at the maker's request, so as to affect the rights

⁵³⁴ *Philpott v. Jones*, 2 Adol. & E. 41. But see *Gammon v. Plaisted*, 51 N. H. 444.

⁵³⁵ *Hill v. Robbins*, 22 Mich. 475.

⁵³⁶ *Bank of North America v. Meredith*, 2 Wash. C. C. 47, Fed. Cas. No. 893.

⁵³⁷ *Fitchburg Mut. Ins. Co. v. Davis*, 121 Mass. 121; *Camp v. Smith*, 136 N. Y. 187, 32 N. E. 640. So, where there is a joint debt on open account secured in part by the individual note and mortgage of one. *Fridley v. Bowen*, 103 Ill. 633. But see *Coleman's Ex'r v. Tully's Adm'r*, 7 Bush (Ky.) 72.

⁵³⁸ *Plomer v. Long*, 1 Starkie, 153.

⁵³⁹ *Moss v. Adams*, 39 N. C. 42.

⁵⁴⁰ *Small v. Older*, 57 Iowa, 326, 10 N. W. 734.

of an indorser of the several notes.⁵⁴¹ And where one has made two notes, one as an individual and one as an administrator, a general payment "on the note" will be applied to the former.⁵⁴² So, a payment by A. will be applied to his note given for his own debt, rather than to an earlier one given by him for a debt of his former firm.⁵⁴³ And, if one joint maker pays an amount to cover his share of two joint notes (one being also signed by a surety), it must be applied to both to satisfy his share, and not wholly to the first to discharge his co-maker also.⁵⁴⁴

On the other hand, if the acceptor of two bills, drawn one by A. and B. and the other by A., receives funds of the drawer A., he must apply them in payment of the bill which matured first, although drawn by A. and B.⁵⁴⁵ So, if the creditor holds a bond of A. and a note of A., B., and C. (received in renewal of a bill of A. indorsed by B. and C.), a payment by A. to the holder, with notice to B. and C. that he had made a payment on the bill, will be applied to the bill in preference to the bond.⁵⁴⁶ On the other hand, it has been held that a general payment should be applied pro rata to an individual note made by A. to the creditor and a joint note made by A. and B. to a third party and indorsed to the creditor.⁵⁴⁷ So, a payment to A. on a general indebtedness is applicable pro rata to two notes which were made one to him alone and the other to him and another person.⁵⁴⁸

⁵⁴¹ *Harding v. Wormley*, 8 Baxt. (Tenn.) 578.

⁵⁴² Especially where the latter note was barred, and the drawer said the creditor could wait until the avails of the estate paid it, *Sawyer v. Tappan*, 14 N. H. 352.

⁵⁴³ *Rosseau v. Cull*, 14 Vt. 83.

⁵⁴⁴ *Merrimack Co. Bank v. Brown*, 12 N. H. 320.

⁵⁴⁵ *Brander v. Phillips*, 18 Pet. 121.

⁵⁴⁶ The holder having afterwards treated the bond as still outstanding, *Hill v. Sutherland's Ex'rs*, 1 Wash. (Va.) 128.

⁵⁴⁷ *Hall v. Constant*, 2 Hall (N. Y.) 185.

⁵⁴⁸ And not to the interest on one and the balance due on the other, *Colby v. Copp*, 35 N. H. 434; but the proceeds of sale under a judgment in attachment must be applied pro rata to all the notes secured by the judgment, and not first to those which have no other security, *Blackstone Bank v. Hill*, 10 Pick. (Mass.) 129.

Application to Secure Debt.

§ 1502. It has been held that the law will apply a general payment to the most precarious and unsecured item of an account,⁵⁴⁹ and that the creditor may in like manner prefer an open account to a secured judgment.⁵⁵⁰ So, the law will prefer bills and notes to judgments.⁵⁵¹ And it will apply a payment, received "without prejudice to the claim we have on A. upon any securities we hold," to collateral bills accepted by A. in preference to collateral mortgages, on which A. was not liable.⁵⁵² A creditor may prefer an unsecured note or account to a secured note.⁵⁵³ If a general payment is made by A. on two notes, one of which was made by A. and the other was made by A. and B. and secured by a guaranty, the court will apply the payment to the former.⁵⁵⁴

The theory of the civil law is to consider the interest of the debtor first, and therefore to prefer a debt that is secured to one that is not,⁵⁵⁵ while at common law the items of an account which are not secured are preferred.⁵⁵⁶

⁵⁴⁹ 2 Daniel, Neg. Inst. 277; 2 Pars. Notes & B. 228; *Sprinkle v. Martin*, 72 N. C. 92; *Johnson's Appeal*, 37 Pa. St. 268; *Jones v. Kilgore*, 2 Rich. Eq. (S. C.) 63. But a collateral mortgage may be applied pro rata to two debts, of which one has additional security and the other not. *Graham v. Jones*, 24 S. C. 241.

⁵⁵⁰ *Watt v. Hoch*, 25 Pa. St. 411. When a mortgage is given to secure £5,000 then due and future advances, half the amount due being further secured by a warrant of attorney, the proceeds of the mortgaged premises, amounting to £3,600, may be so applied by the creditor to the later advances as to enable him to enter judgment on the warrant for the whole amount secured by it. *Stoveld v. Wade*, 4 Bing. 154, 12 Moore, 370.

⁵⁵¹ *Field v. Holland*, 6 Cranch, 8.

⁵⁵² *Birch v. Tebbutt*, 2 Starkie, 74.

⁵⁵³ *Plain v. Roth*, 107 Ill. 588; and the law would so apply it.

⁵⁵⁴ *McDaniel v. Barnes*, 5 Bush (Ky.) 183.

⁵⁵⁵ *Spiller v. Creditors*, 16 La. Ann. 202.

⁵⁵⁶ Whether they are the later items, *Pardee v. Markle*, 111 Pa. St. 548, 5 Atl. 36; or the earlier ones, *Woods v. Sherman*, 71 Pa. St. 100. But see *Pierce v. Sweet*, 33 Pa. St. 151.

Debts with a Surety.

§ 1503. When a surety is liable on some part of the debt and not on others, the law will, in general, appropriate a payment so as to relieve him.⁵⁵⁷ In like manner, it will apply payment by a tenant to a note given with a surety for release of a prior distress rather than to rent subsequently accrued.⁵⁵⁸ But an application of payment by the creditor may be to the prejudice of the surety.⁵⁵⁹ And he may apply a payment first to an account against the individual drawer, and then to a bill or note of the drawer's earlier firm made with a surety.⁵⁶⁰

But, where the debtor has appropriated the payment to a guaranteed debt, the creditor cannot apply it otherwise.⁵⁶¹ So, if a surety advances money to his principal to pay a note, and it is paid over by the principal to the payee with that understanding, and is afterwards applied by him, with the consent of the principal, to another debt, the latter appropriation will be bad as against the surety.⁵⁶² But an agreement between principal and surety that a payment by the principal shall be applied to the note, on which the surety is liable, will not prevent its application by the creditor, who had no notice of this arrangement, to another note.⁵⁶³ If a bank

⁵⁵⁷ 2 Edw. Bills & N. 758; 2 Pars. Notes & B. 228. So held as to two notes, one of which was secured by a surety, *Nuttall's Adm'r v. Brannin's Ex'rs*, 5 Bush (Ky.) 11; or as to an account secured in part by note of a surety, *Marryatts v. White*, 2 Starkie, 101; or as between acceptances paid by an accommodation acceptor and a note of the drawer, *Byrne v. Grayson*, 15 La. Ann. 457.

⁵⁵⁸ *Palfrey v. Baker*, 3 Price, 572.

⁵⁵⁹ *Goddard v. Cox*, 2 Strange, 1104; *Sanborn v. Stark*, 31 Fed. 18; or guarantor, *Kirby v. Duke of Marlborough*, 2 Maule & S. 18. So, the application by him of the proceeds of collateral, *Dennistoun v. Hill*, 173 Pa. St. 633, 34 Atl. 452; or to relieve the surety, *Rosenbaum v. Bank*, 73 Miss. 267, 18 South. 549.

⁵⁶⁰ *Logan v. Mason*, 6 Watts & S. (Pa.) 9.

⁵⁶¹ *Wetherell v. Joy*, 40 Me. 325. So, when the maker of a note has paid it to an attaching creditor of the payee, a prior indorsee cannot insist on the application of the payment to another note of the maker held by the same payee after he had indorsed the first note. *Newman v. Manning*, 79 Ind. 218.

⁵⁶² *Reed v. Boardman*, 20 Pick. 441.

⁵⁶³ *Harding v. Tiffit*, 75 N. Y. 461.

holds a bill of A. accepted for A.'s accommodation by C., and a note of A. discounted by the bank with B.'s indorsement, a subsequent payment by A. will be applied pro rata to both.⁵⁶⁴

§ 1504. — On the other hand, if two notes maturing at the same time are both secured by a mortgage, and one of them has a surety on it, it has been held that the proceeds of the mortgage will be applied first to the note that has no surety.⁵⁶⁵ But, where the creditor holds a collateral mortgage, he may apply the payment without regard to the rights of a purchaser of the mortgaged premises.⁵⁶⁶ If he recovers a judgment, however, on several notes, and some of them have a surety, the proceeds of his execution (which is not a voluntary payment) must be applied pro rata, and not to the note which has no surety.⁵⁶⁷

After a bill has been dishonored by an accommodation acceptor. a deposit made by the drawer will be applied by the law to the bill. and not to the drawer's general account.⁵⁶⁸ But deposits by the maker of a note which is payable at a bank cannot be applied to the note, without further authority from the maker, for the purpose of saving the surety.⁵⁶⁹ And if a note held by a bank is dishonored. and the maker afterwards deposits a larger amount with the bank. the bank is not obliged to apply it on the note in order to relieve an indorser.⁵⁷⁰ Where a guaranty is given against overdrafts by A., and A.'s account is balanced and closed at the guarantor's death without notice to his executors, leaving a balance still due the bank. the guarantor's estate is not entitled to have the benefit of subsequent deposits, which have been credited by the bank on a new account of A.⁵⁷¹ So, where a bill is drawn on A. for the account of B. and is not accepted, subsequent remittances by the drawer to

⁵⁶⁴ *White v. Trumbull*, 15 N. J. Law, 314.

⁵⁶⁵ *Hanford v. Robertson*, 47 Mich. 100, 10 N. W. 125.

⁵⁶⁶ *Riddle v. Rosenfeld*, 103 Ill. 600.

⁵⁶⁷ *Blackstone Bank v. Hill*, 10 Pick. (Mass.) 129.

⁵⁶⁸ *Chit. Bills*, 456; *Marsh v. Houlditch*, Western Sittings 1818. In this case the debtor had requested the holder to look to him, and not apply to the acceptor, and he had agreed to do so, and the drawer's account was afterwards large enough to meet the bill, although eventually it was reduced and the balance turned against him.

⁵⁶⁹ *Scott v. Shirk*, 60 Ind. 160.

⁵⁷⁰ *National Bank of Newburgh v. Smith*, 66 N. Y. 271.

⁵⁷¹ *London & County Banking Co. v. Terry*, 25 Ch. Div. 692.

B. to cover the bill, before the arrival of which A. and B. both became bankrupt, need not be applied to payment of the bill which had not been accepted.⁵⁷²

Bills and Other Debts.

§ 1505. The creditor may appropriate the payment either to a note of the debtor or to an open account.⁵⁷³ So, the balance in favor of a bank cashier may be applied to the payment of his note with a surety rather than in reduction of damages due to the bank by reason of his previous defaults and covered by his official bond.⁵⁷⁴ So, if the debtor leaves money with a creditor to apply either on a debt or an overdue note, it may be applied to the latter for the purpose of stopping the running of the statute of limitations.⁵⁷⁵ But, if the debtor has directed the payment to be applied on the note, the holder cannot credit it on the account and submit it to the jury as such.⁵⁷⁶ And, even where the indorser of a note has been discharged by the holder's laches, a payment by the maker may be applied by the creditor to another debt rather than to the note.⁵⁷⁷ Where B. is the owner of a check drawn by A., which had been forwarded and lost in the mail and afterwards dishonored, and also of other checks of A. exceeding the amount of the payment, he may appropriate to the latter rather than the former a payment made by A. after he received notice of the loss of the first check, although A. had then become insolvent, unknown to B.⁵⁷⁸ But the law will apply a payment to the acceptance of a bill rather than to a debt secured by mortgage.⁵⁷⁹

Where the creditor holds several notes, he is not obliged to appropriate the payment pro rata, but may apply it to any one of

⁵⁷² *Vaughan v. Halliday*, 9 Ch. App. 561.

⁵⁷³ *Wittkowski v. Reid*, 84 N. C. 21; *Bell v. Bell*, 20 S. C. 34; *Arnold v. Johnson*, 2 Ill. 196.

⁵⁷⁴ *President, etc., of Dedham Bank v. Chickering*, 4 Pick. (Mass.) 314.

⁵⁷⁵ *Jackson v. Burke*, 1 Dill. 311, Fed. Cas. No. 7,133.

⁵⁷⁶ *Craig v. Miller*, 103 Ill. 605.

⁵⁷⁷ *Van Norden v. Buckley*, 5 Cal. 284.

⁵⁷⁸ *Shipsey v. Bank*, 59 N. Y. 485.

⁵⁷⁹ *Birch v. Tebbutt*, 2 Starkie, 74.

them.⁵⁸⁰ But payment made to an agent expressly on account of two notes must be applied to both pro rata.⁵⁸¹ So, if the holder of a number of bills (by the same drawer, with different dates, indorsers, and time of maturity) obtains a fund of the drawer's by means of legal proceedings, he must apply it to all pro rata.⁵⁸² But the holder of several notes cannot distribute a general payment among them all, so as to bar the statute of limitations as to all.⁵⁸³

Proceeds of Collateral Mortgage.

§ 1506. Where several notes are secured by one collateral mortgage, different rules are adopted in different states for the application of the proceeds. In some states it is held that the proceeds must be applied pro rata, although the notes mature at different times,⁵⁸⁴ provided they are all due.⁵⁸⁵ And this has been held to be true of an assignment made by the maker to secure several notes.⁵⁸⁶ If the notes themselves are assigned, in the absence of any special agreement, the collateral mortgage will go with the notes pro rata.⁵⁸⁷ And the proceeds of the collateral will be ap-

⁵⁸⁰ Blackman v. Leonard, 15 La. Ann. 59. So, too, a collateral judgment securing two notes. Smith v. Bank, 104 Pa. St. 518.

⁵⁸¹ Jones v. Perkins, 29 Miss. 139.

⁵⁸² All constituting one debt, as between the holder and the drawer, Cowperthwaite v. Sheffield, 1 Sandf. (N. Y.) 416.

⁵⁸³ Ayer v. Hawkins, 19 Vt. 26; Wheeler v. House, 27 Vt. 735.

⁵⁸⁴ Wilcox v. Allen, 36 Mich. 100; Kramer's Appeal, 37 Pa. St. 71; Darrow v. Scullin, 19 Kan. 57; Hall v. McCormick, 31 Minn. 280, 17 N. W. 620; Aaron v. Warner, 62 Miss. 370; although there was an accommodation indorser on the first note, Parker v. Mercer, 6 How. (Miss.) 320; but the receiver of the payee, for whose accommodation the notes were made and who had secured them by a collateral deed in trust, cannot claim a pro rata benefit for notes already paid by such payee, Wooldridge v. Bowmar, 64 Miss. 34, 8 South. 233.

⁵⁸⁵ Cage v. Iler, 5 Smedes & M. (Miss.) 410. So, where all become due by the terms of the mortgage on default in one. Pierce v. Shaw, 51 Wis. 316, 8 N. W. 209.

⁵⁸⁶ Bailey v. Bergen, 2 Hun (N. Y.) 520.

⁵⁸⁷ Keyes v. Wood, 21 Vt. 331. So, although one is assigned with the mortgage, and the other without making mention of it. Waterman v. Hunt, 2 R. I. 298. And if the mortgage is foreclosed as to the note maturing last, a purchaser, who knew of the other notes and assumed their payment, is liable to a second foreclosure on their account. Hill v. Minor, 79 Ind. 48.

plied *pro rata*, although the note which matured first has been transferred by the payee;⁵⁸⁸ or although the mortgagee transferred the note maturing last to A., and agreed to assign the mortgage with it, and afterwards assigned that which matured first to B., saying that it and another note, which he still held, were secured by a mortgage, and he would assign it to B.⁵⁸⁹ In such states, the fact that the note was transferred after maturity does not affect the right to a *pro rata* distribution.⁵⁹⁰

In other states, the rule is that the proceeds of the collateral mortgage shall be applied to the notes in the order of their maturity;⁵⁹¹ and that such a mortgage is, in effect, a succession of mortgages securing the different notes, and must be paid as such.⁵⁹² And it has been held that such notes are entitled, as they successively mature, to be satisfied under a power of sale in the mortgage.⁵⁹³ And they take precedence in the order of their priority in maturing, al-

⁵⁸⁸ *Hancock's Appeal*, 34 Pa. St. 155; *Delespine v. Campbell*, 52 Tex. 4. And this is true of two concurrent mortgages, one securing two notes and the other securing a bond, although they matured at different times, and the notes were transferred to a holder with notice, and the bond remained in the original mortgagee's hands. *Granger v. Crouch*, 86 N. Y. 494. And notes secured by one mortgage are to be paid *pro rata*, although maturing at different times and assigned to different persons. *Johnson v. Candage*, 31 Me. 28. And if the note maturing last is transferred with an express agreement for *pro rata* application of the mortgage, the agreement will be binding on a subsequent purchaser of the other notes who took an assignment of the mortgage knowing of the transfer of the first note, but not of the special agreement. *Redman v. Purrington*, 65 Cal. 271, 3 Pac. 883. And parol evidence is inadmissible to show an agreement, on assigning one of the bonds, that it should have priority. *Hancock's Appeal*, 34 Pa. St. 155. But the holder of one note may be estopped by his admission of the priority of another. *Belding v. Manly*, 21 Vt. 550.

⁵⁸⁹ *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907.

⁵⁹⁰ *Reine v. Jack*, 31 La. Ann. 859.

⁵⁹¹ *Winters v. Bank*, 33 Ohio St. 250; *Thompson v. Field*, 38 Mo. 320; *Aultman-Taylor Co. v. McGeorge*, 31 Kan. 329, 2 Pac. 778; *McDonnell v. Burns*, 28 C. C. A. 174, 83 Fed. 866; *In re Ferguson's Estate*, 124 Mo. 574, 27 S. W. 513; and where one of the two payees transferred his interest in the second note, reserving his interest in the first, the assignee takes subject only to the priority of the first note, *Wood v. Trask*, 7 Wis. 566.

⁵⁹² *Gerber v. Sharp*, 72 Ind. 553; notwithstanding an extension of the first. *People's Sav. Bank v. Finney*, 63 Ind. 460.

⁵⁹³ *Mitchell v. Ladew*, 36 Mo. 526.

though transferred to different persons,⁵⁹⁴ except that the first holder is to be postponed to all his several assignees.⁵⁹⁵

In other states, it is held that several notes secured by a vendor's lien,⁵⁹⁶ or mortgage,⁵⁹⁷ take precedence in the order in which they are transferred, irrespective of the order in which they mature. The order of priority, however, of successive notes secured by a collateral mortgage, may be reversed by an express agreement.⁵⁹⁸ And such agreement will be binding upon the parties to it and upon all purchasers with notice.⁵⁹⁹

Application of Collateral to Bills of Insolvent Parties.

§ 1507. Where an acceptor becomes bankrupt, the collateral securing his acceptance will inure in equity to the benefit of subsequent holders, both as against the drawer who deposited it and as against the acceptor's general creditors.⁶⁰⁰ This is true of a mort-

⁵⁹⁴ Richardson v. McKim, 20 Kan. 346; Parkhurst v. Engine Co., 107 Ind. 594, 8 N. E. 635.

⁵⁹⁵ Parkhurst v. Engine Co., supra; although the note was transferred by delivery only, without any assignment of the mortgage, Walker v. Schreiber, 47 Iowa, 529; but it has been held that, if the last is assigned by mistake, the one held by the assignor is entitled to priority, Herrington v. McCollum, 73 Ill. 476; and the preference may be waived by the assignee, Forwood v. Dehoney, 5 Bush (Ky.) 174.

⁵⁹⁶ Griggsby v. Hair, 25 Ala. 327.

⁵⁹⁷ McClintic v. Wise's Adm'rs, 25 Grat. (Va.) 448; Nelson v. Dunn, 15 Ala. 501; unless a preference is given at the time of assignment, Cullum v. Erwin, 4 Ala. 452. So, where the note maturing last is assigned with the mortgage, "with all the right, title, and interest" of the mortgagee. Noyes v. White, 9 Kan. 640. But an assignment by the payee to A. of "all his title and interest to the said mortgage, so far as the same is intended to secure the payment of the second note named in the condition of the said mortgage, together with said second note," with a covenant of warranty against himself and a subsequent assignment to B. of the first note (first due), gives A. priority to B., although his note matured last. Bryant v. Damon, 6 Gray (Mass.) 564.

⁵⁹⁸ Ellis v. Lamme, 42 Mo. 154.

⁵⁹⁹ Walker v. Dement, 42 Ill. 272.

⁶⁰⁰ Ex parte Waring, 19 Ves. 345. But this is not true of remittances on general account not specifically appropriated to the particular acceptance. In re Broad, 13 Q. B. Div. 740.

gage given to secure a cash credit, which was furnished by acceptances of the mortgagee.⁶⁰¹

And where a bill of exchange is drawn against a consignment and bill of lading, and the drawee refuses to accept it, the holder of the bill has a claim on the consignment in preference to the general account of the drawee against the drawer;⁶⁰² as well as to the claim of an attaching creditor of the drawer.⁶⁰³ So, if the holder of a draft takes it on the faith of representations of the drawer that he had funds with the drawee out of which the bill would be paid, and the drawee refuses to accept the bill after the drawer's failure, although it had such funds in hand, the purchaser of the draft will be entitled to be paid out of the funds.⁶⁰⁴ So, if A. sends a consignment to B. with notice that he should draw on C., and B. remits "short bills" to C. "against the acceptances," and both B., the drawer, and C., the acceptor, become bankrupt, the holders of the acceptances will be entitled to the security of the "short bills."⁶⁰⁵ So, where B. drew bills on A., and with the proceeds purchased cotton and consigned it to A., and A. and B. are partners in the special transaction, and both bankrupt, the holders of the bills will be entitled to the cotton as between A. and B. and as against them both.⁶⁰⁶

§ 1508. — But deposits made with A. bank to secure overdrafts will be applied, first, to the balance due the bank; next, to the holders of later drafts; and, lastly, to general creditors of the drawer.⁶⁰⁷ So, if stock is deposited by the drawer as collateral to secure an acceptance, and the acceptor is wound up as a corporation under the English Bankruptcy Act (which does not amount of

⁶⁰¹ *City Bank v. Luckie*, 5 Ch. App. 773.

⁶⁰² *Frith v. Forbes*, 4 De Gex, F. & J. 409. So, as against the drawee's assignee. *Flour City Nat. Bank of Rochester v. Garfield*, 30 Hun (N. Y.) 579.

⁶⁰³ *Ranken v. Alfaro*, 5 Ch. Div. 786, although the drawee, on refusing acceptance, had transferred the bill of lading at the drawer's request.

⁶⁰⁴ *Thomson v. Simpson*, L. R. 9 Eq. 497.

⁶⁰⁵ *Ex parte Smart*, 8 Ch. App. 220.

⁶⁰⁶ The rights of creditors of A. and B. in the special partnership, if any, being left for further consideration, *Ex parte Dewhurst*, 8 Ch. App. 965; but where drawer and drawee both failed, while the goods were still in transitu, the court refused to appropriate the goods either to the holders of the bills or the creditors of the drawer, *Ex parte Banner*, 2 Ch. Div. 278.

⁶⁰⁷ *Garvin v. Bank*, 7 S. C. 266.

itself to proof of insolvency), and a balance is then due to the acceptor from the drawer, the collateral will be applied, under the general banker's lien, to the acceptor's general creditors, and not to the holders of the acceptances.⁶⁰⁸ If bills are remitted by A. to B. to cover the latter's acceptances, and B. becomes insolvent, and pays a dividend on such acceptances, and is indebted to A. over and above the bills remitted to him, but not used, such bills will belong to the drawer (who is not shown to be insolvent) rather than to the acceptor's estate or the holders of the acceptances;⁶⁰⁹ and to the holders of the bills in preference to general creditors.⁶¹⁰ But if the acceptor and drawer are both insolvent, and the drawer has made a composition with his creditors without an assignment, and remains liable on the bill, the holder cannot claim payment out of the collateral furnished by the drawer.⁶¹¹ So, if bills are drawn generally, and bills of lading forwarded independently to the consignee;⁶¹² or if the bills of exchange contain an express request to charge to shipments, but the drawer fails before the bills are accepted or the shipments arrive.⁶¹³ So, if a bill is drawn on a consignee with the direction "to place to account of cargo per A.," and the consignee is jointly interested with the drawer in the venture, the cargo will belong to the drawee's general account, and not be subject to any claims on the part of the holder of the bill,⁶¹⁴ although the bill of lading was not attached to the bill of exchange, and the latter was accepted before its arrival.⁶¹⁵

Where a mortgage is given to indemnify an accommodation indorser, and the maker and indorser are both insolvent, the mortgage will be applied in equity to the benefit of the holder of the

⁶⁰⁸ *Hickle's Case*, L. R. 4 Eq. 226.

⁶⁰⁹ *Ex parte Gomez*, 10 Ch. App. 639.

⁶¹⁰ *Ex parte Dever*, 14 Q. B. Div. 611, reversing 13 Q. B. Div. 766, although the bills of lading were surrendered by the agreement to the acceptor, and not attached to the acceptances.

⁶¹¹ *Ex parte General South American Co.*, 10 Ch. App. 635; and the drawer will not be entitled to have it so applied, *Levi's Case*, L. R. 7 Eq. 449.

⁶¹² *Phelps v. Comber*, 29 Ch. Div. 813, affirming 26 Ch. Div. 755.

⁶¹³ *Brown v. Kough*, 26 Ch. Div. 848; the shipments being applied to the general indebtedness of the drawer to the consignee.

⁶¹⁴ *Robey v. Ollier*, 7 Ch. App. 695.

⁶¹⁵ *Ex parte Arbuthnot*, 3 Ch. Div. 477.

note.⁶¹⁶ But if the indorser, to whom the indemnity is given, is discharged for want of notice of dishonor, the indorser will not be subrogated to the indemnity.⁶¹⁷ Accommodation drawer and indorsers are not co-sureties, and, where securities are given to such indorsers by the party accommodated, the drawer will not be entitled to share pro rata in the benefit.⁶¹⁸

If a bill of lading is forwarded with a draft, and the draft is accepted, the drawee will be entitled to the bill of lading on such acceptance, and the collecting bank to which the draft was sent will not be liable to the holder for surrendering the bill of lading to him.⁶¹⁹ But if a bill of lading is payable to the order of the shipper, and is delivered with the bill of exchange on its being discounted, with instructions not to deliver it to the drawee until payment of the bill, the drawee will not be entitled to the bill of lading on mere acceptance of the draft.⁶²⁰

⁶¹⁶ *Rice v. Dewey*, 13 Gray (Mass.) 47.

⁶¹⁷ *Bank of Virginia v. Boisseau*, 12 Leigh (Va.) 387.

⁶¹⁸ *McCune v. Belt*, 45 Mo. 174.

⁶¹⁹ *National Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 92.

⁶²⁰ *Dows v. Bank*, 91 U. S. 618.

CHAPTER XLI.

PAYMENT BY BILL OR NOTE.

- I. PAYMENT BY DEBTOR'S NOTE.
- II. PAYMENT BY NOTE OF ANOTHER PERSON.
- III. PAYMENT BY BILL, CHECK, OR ACCEPTANCE.
- IV. EFFECT UPON PRIOR DEBT OR SECURITY.

I. PAYMENT BY DEBTOR'S NOTE.

- § 1509. Note of Debtor.
- 1510. — Of Executor—Agent.
- 1511. Renewal.
- 1512. Agreement for Absolute Payment.
- 1515. Payment by Bill—How Pleaded.
- 1516. Satisfaction—A Question of Intention.
- 1517. Presumption of Payment—Massachusetts Rule.
- 1518. — Rebutted.
- 1519. Effect of Receipt.
- 1520. — Of Surrender of Original Note.
- 1521. — Of Retention of Original Note.
- 1522. — Of Additional Security.
- 1523. — Of Transfer.
- 1525. — Of Loss.
- 1526. Invalid Bills.
- 1527. Unstamped Bill.
- 1528. Usurious Bill.
- 1529. Altered Bill.
- 1530. Forged Bill.
- 1531. Effect of Fraud.
- 1532. Valueless Bill.
- 1533. Note to Third Party.

Payment by Debtor's Note.

- § 1509. If the debtor gives his own note for a debt, it will not be an absolute payment, unless it is taken as such by the agreement (2172)

of the parties.¹ This applies to the note of any party already liable.²

And this is so whether it is given by the debtor for goods purchased at the time,³ or in payment of a previous debt,⁴ or in satisfaction of a debt by specialty.⁵ In Indiana, however, the debtor's

¹ *Davis v. Gyde*, 2 Adol. & E. 623; *Dixon v. Holdroyd*, 7 El. & Bl. 903; *Lyman v. Bank*, 12 How. 244; *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. 687; *Lawrence v. U. S.*, 71 Fed. 228; *Davis v. Allen*, 3 N. Y. 168; *Coxe v. Hankinson*, 1 N. J. Law, 85; *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. 39; *Morgan v. Bitzenberger*, 3 Gill (Md.) 350; *Matthews v. Dare*, 20 Md. 248; *Matteson v. Ellsworth*, 33 Wis. 488; *Breiting v. Lindauer*, 37 Mich. 217; *Blunt v. Walker*, 11 Wis. 334; *Kelsey v. Rosborough*, 2 Rich. Law (S. C.) 241; *McLaren v. Hall*, 26 Iowa, 297; *Edwards v. Trulock*, 37 Iowa, 244; *Farwell v. Grier*, 38 Iowa, 83; *Gilman v. Stevens*, 63 N. H. 342, 1 Atl. 202; *Brewster v. Bours*, 8 Cal. 501; *Griffith v. Grogan*, 12 Cal. 317; *Citizens' Bank of Steubenville v. Carson*, 32 Mo. 191; *Sturdevant Bank v. Peterman*, 21 Mo. App. 512; *Mooring v. Insurance Co.*, 27 Ala. 254; *McWilliams v. Phillips*, 71 Ala. 80; *Washington Slate Co. v. Burdick*, 60 Minn. 270, 62 N. W. 285; *Fry v. Patterson*, 49 N. J. Law, 612, 10 Atl. 390.

² E. g. an indorser's note. *Schmidt v. Livingston*, 16 Misc. Rep. 554, 38 N. Y. Supp. 746; *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16; *Hall v. Engine Co.*, 91 Ala. 363, 3 South. 348; *Myatts v. Bell*, 41 Ala. 222; *Keel v. Larkin*, 72 Ala. 493; *Marshall v. Marshall's Ex'r*, 42 Ala. 149; *Heath v. White*, 3 Utah, 474, 24 Pac. 762. So, in Illinois, if the note is not sealed. *Rayburn v. Day*, 27 Ill. 46. And whether it is sealed or not. *Walsh v. Lennon*, 98 Ill. 27; *Pelzer v. Steadman*, 22 S. C. 279.

³ 2 Daniel, Neg. Inst. 286; 2 Pars. Notes & B. 157; *Bill v. Porter*, 9 Conn. 23. And recovery may be had in New York on the original debt, notwithstanding such note, *Vancelef v. Therasson*, 3 Pick. (Mass.) 12. So, the goods may be stopped in transitu without offering first to return the purchaser's note. *Hays v. Mouille*, 14 Pa. St. 48.

⁴ 2 Daniel, Neg. Inst. 284; 1 Edw. Bills & N. § 278; 2 Pars. Notes & B. 150; *Story, Bills*, § 419; *Bank of U. S. v. Daniel*, 12 Pet. (U. S.) 32; *Allen v. King*, 4 McLean, 128, Fed. Cas. No. 226; *Raymond v. Merchant*, 3 Cow. (N. Y.) 147; *Putnam v. Lewis*, 8 Johns. (N. Y.) 389; *Wildrick v. Swain*, 34 N. J. Eq. 167; *Swain v. Frazier*, 35 N. J. Eq. 326; *Nightingale v. Chafee*, 11 R. I. 609; *Farwell v. Salpaugh*, 32 Iowa, 582; *Smith v. Owens*, 21 Cal. 11; *Morriss v. Harveys*, 75 Va. 726; *Wiles v. Robinson*, 80 Mo. 47; *Foster v. Hill*, 36 N. H. 526; *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923. So, a note given for taxes is not a payment. *Jaffrey v. Cornish*, 10 N. H. 505.

⁵ *Bytes, Bills*, 388; 2 Daniel, Neg. Inst. 296; *Drake v. Mitchell*, 3 East, 251. And see *Curtis v. Rush*, 2 Ves. & B. 416.

own negotiable note has been held to be payment of a precedent debt, in the absence of an agreement to the contrary.⁶ But the debtor's nonnegotiable note is not a payment, and an action will still lie on the original debt.⁷ So, a county order is no discharge of a debt due from the county;⁸ and an interest coupon is no payment of the interest on a bond or note.⁹ So, notes given in a bankruptcy composition are not "money" (as required by the bankrupt act), and do not discharge the debt unless paid.¹⁰

In like manner, an agreement to pay partly in cash and partly by note does not constitute a payment, unless it is so agreed.¹¹ So, where a creditor agrees to take in payment an order for hardware, and returns a note (sent him instead of the order) after an ineffectual effort to get the hardware upon it, it will not be a payment.¹²

In general, a covenant to give a bill implies a covenant for its payment.¹³ But a negotiable note is, until its actual delivery, merely evidence of a promise to pay.¹⁴ If a buyer agrees to surrender the vendor's own note in part payment for goods, the note will not be discharged until the contract is carried out; and, if the buyer fails to deliver it then, the seller may recover the entire purchase

⁶ *Krutsinger v. Brown*, 72 Ind. 466; so, *prima facie*, *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131.

⁷ *Greenwood v. Curtis*, 4 Mass. 93; *Dutton Ministerial & School Fund v. Kendrick*, 12 Me. 381. So, in Indiana, as to notes not payable in bank, *Alford v. Baker*, 53 Ind. 279; *Jeffries v. Lamb*, 73 Ind. 202; *Lindeman v. Rosenfield*, 67 Ind. 246, without express agreement and new consideration; or payable at bank, but not payable to order or bearer, *Albright v. Griffin*, 78 Ind. 182.

⁸ *People v. Johnson*, 100 Ill. 537.

⁹ *Hoodless v. Reid*, 112 Ill. 105.

¹⁰ *Pupke v. Churchill*, 16 Mo. App. 334. And see *In re Reiman*, 13 N. B. R. 128, Fed. Cas. No. 11,675; *In re Hatton*, 7 Ch. App. 723; *Edwards v. Coombe*, L. R. 7 C. P. 519.

¹¹ *East River Bank v. Kennedy*, 9 Bosw. (N. Y.) 543.

¹² *Surdan v. Lyman*, 36 Vt. 733.

¹³ *Byles, Bills*, 332; *Dixon v. Holdroyd*, 7 El. & Bl. 903. An indorser's note is, however, sufficient payment to support his action, while it is still outstanding, against the maker of the original note. *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16. But see, *contra*, *Lentell v. Getchell*, 59 Me. 135, as to a renewal by an accommodation indorser. So, payment of a judgment by a negotiable bond, to support the payor's action against an agent for negligence to which the judgment was due. *Sioux City v. Weare*, 59 Iowa. 95, 12 N. W. 786.

¹⁴ *Arnold v. Delano*, 4 Cush. (Mass.) 33.

money in cash.¹⁵ And a bond and warrant to confess judgment, payable in installments, given upon a parol agreement for extension, will not constitute a payment until actually paid.¹⁶

Note by Executor—Agent.

§ 1510. If a testator's note is renewed by his executor, to gain time to collect funds and pay the debt, the note will not be a payment.¹⁷ And if an administrator gives his bond to the estate for a debt owing from himself, and takes a receipt for the bond, it will be presumed to be a conditional payment only.¹⁸ So, if the note of a deceased maker is renewed by the note of his widow, indorsed by the executor, for the purpose of gaining time, and not intended as a payment, it will not discharge the debt.¹⁹ But, if the individual note of the executor is taken for a debt owing by him as trustee, it has been held that the debt will thereby lose its fiduciary character.²⁰ So, if the individual note of an administrator, who had received an amount of money from the estate for the purpose of paying a debt, is taken for the debt, and extension is given by renewals of such note for several years, and until the maker had become insolvent, it will be a payment, and discharge the estate originally liable.²¹

In like manner, an agent's note will not, in general, discharge the debt of his principal;²² especially where it has been given without prejudice as to the principal.²³ And, in the absence of a special agreement, such note is not a payment, although the agent was in-

¹⁵ Gray v. White, 108 Mass. 228.

¹⁶ And the parol agreement for time will be no defense. Davey v. Prendergrass, 5 Barn. & Ald. 187.

¹⁷ Peter v. Beverly, 10 Pet. 532; Glenn v. Burrows, 37 Hun (N. Y.) 602; unless it is intended to be a payment, Yerger v. Foote, 48 Miss. 62. And see White v. Thompson, 79 Me. 207, 9 Atl. 118.

¹⁸ Hoge v. Vintroux, 21 W. Va. 1.

¹⁹ Peter v. Beverly, 10 Pet. 532.

²⁰ Lawton v. Fish, 51 Ga. 647; Hill v. Riley, 21 S. C. 602.

²¹ James v. Hackley, 16 Johns. (N. Y.) 273.

²² Porter v. Talcott, 1 Cow. (N. Y.) 350; Taylor v. Conner, 41 Miss. 722; especially if the receipt for it reads, "Which, when paid, will be in full," etc., Ayres v. Van Lieu, 5 N. J. Law, 881.

²³ Wyatt v. Hertford, 3 East, 147.

debted to the principal, and charged him with the amount of the note,²⁴ or although the time for payment was thereby extended.²⁵ But if a seller of goods accepts the note of the buyer's agent as payment, knowing him to be such agent, it will discharge the principal, although the note is not paid.²⁶ If a husband signs a note as agent for his wife, it will, in like manner, not discharge her debt, unless it is so agreed;²⁷ but an action will still lie against her on the original debt.²⁸ So, a note given by the selectmen of a town for a debt due from the town will not extinguish the original debt.²⁹

Renewal of Bill or Note.

§ 1511. The renewal of a bill or note is not, in general, a payment.³⁰ So, if a note made by A. and B. is paid by the check of A., and a new note by A. and B. is discounted by the bank holding the original note and credited to A., and this is repeated several times, the transactions will be regarded as renewals, and not payment of the original note.³¹ So, the renewal of a lost draft, with the word "Duplicate" written across the face, and without any new

²⁴ *Higby v. Railroad Co.*, 7 Abb. Prac. (N. Y.) 259. But where the agent has charged the amount to his principal, a corporation, and been paid by it, it was held to be a payment by the corporation in *Wright v. Ware Co.*, 1 N. H. 281.

²⁵ *Rathbone v. Tucker*, 15 Wend. (N. Y.) 498.

²⁶ *Perkins v. Cady*, 111 Mass. 318; *Palge v. Stone*, 10 Metc. (Mass.) 160.

²⁷ *Rawlings v. Robson*, 70 Ga. 595.

²⁸ *Gulon v. Doherty*, 43 Miss. 538.

²⁹ *Kidder v. Knox*, 48 Me. 551.

³⁰ *Benj. Chalm. Dig.* art. 521; 2 Daniel, Neg. Inst. 289; 2 Pars. Notes & B. 204; *Farrington v. Bank*, 24 Barb. (N. Y.) 554; *Bank of Commonwealth v. Letcher*, 3 J. J. Marsh. (Ky.) 195; *Lowry v. Fisher*, 2 Bush (Ky.) 70; *Bank of America v. McNeill*, 10 Bush. (Ky.) 54; *Reeder v. Nay*, 95 Ind. 164. Contra, *Nichol v. Bate*, 10 Yerg. (Tenn.) 429; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210; *Jansen v. Grimshaw*, 125 Ill. 468, 17 N. E. 850; *Chisholm v. Williams*, 128 Ill. 115, 21 N. E. 215; *McMorran v. Murphy*, 68 Mich. 246, 36 N. W. 60; *Geib v. Reynolds*, 35 Minn. 331, 28 N. W. 923; *National Bank of Chester v. Gunhouse*, 17 S. C. 489; *First Nat. Bank v. Case*, 63 Wis. 504, 22 N. W. 833; *Holland Trust Co. v. Waddell*, 75 Hun, 104, 28 N. Y. Supp. 980.

³¹ *Lee v. Hollister*, 5 Fed. 752; *McElwee v. Lumber Co.*, 16 C. C. A. 232, 69 Fed. 302.

consideration, will create no additional liability on the drawer's part.³²

A renewal is not a payment, unless so intended or agreed.³³ But, where the renewal was sent to the holder with the request to return the original note, it was held that the old note was discharged, although he retained both.³⁴ On the other hand, where a maker, on the maturity of an indorsed note, leaves a renewal at the bank, with word that the indorsers will call and sign it, it will not be a payment of the original note.³⁵

But where the new note is discounted, and the old note is paid with the proceeds of the discount, it has been held to be a payment, and not a mere renewal.³⁶ And the old note will be canceled if paid in money, although the money is immediately loaned again to the debtor.³⁷ If the original note is taken up with funds other than the proceeds of the discount of the new note, it will not be a renewal.³⁸ But, if it is paid out of the proceeds of the new discount, it will be a renewal, if so intended.³⁹

³² *Benton v. Martin*, 52 N. Y. 571, 40 N. Y. 345. And see 31 N. Y. 382.

³³ And it is a question for the jury whether there is such an intention, *Wheeler v. Berkeley*, 138 Ill. 153, 27 N. E. 942; *Brown v. Scott*, 51 Pa. St. 357; *Corner v. Pratt*, 138 Mass. 446; or agreement, *Hart v. Boller*, 15 Serg. & R. (Pa.) 162. And see § 1516, *infra*. And, if it is usurious, the right of action to recover the usury paid was from its payment, and not from its date, *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. 143.

³⁴ *Sage v. Walker*, 12 Mich. 425.

³⁵ *Auburn City Nat. Bank v. Hunsiker*, 72 N. Y. 252. Although the renewal was credited on the books of the bank, and although the first note was marked "Paid."

³⁶ *Fisher v. Marvin*, 47 Barb. (N. Y.) 159.

³⁷ 2 Pars. Notes & B. 203; *Merriman v. Manufacturing Co.*, 12 R. I. 175. In such case the second note discounted is not a renewal, but a new loan, and is therefore not covered by security given for the maker's indebtedness prior to the maturity of the original note, although a renewal in general carries the original collateral with it. *Buck v. Wood*, 85 Me. 204, 27 Atl. 103; *Holland Trust Co. v. Waddell*, 75 Hun, 104, 26 N. Y. Supp. 980. So, where a second note is discounted at the maturity of the first, and the proceeds credited to the maker, and at its maturity a third note is discounted, including another debt also, the first note has been held to be paid and extinguished by the second. *Letcher v. Bank*, 1 Dana (Ky.) 82.

³⁸ *Hartley v. Kirlin*, 45 Pa. St. 49.

³⁹ And the original collateral will go with it. *Flanagin v. Hambleton*, 54 Md. 222.

Note Taken as Payment by Agreement.

§ 1512. A bill or note may be taken in absolute satisfaction by agreement of the parties to the payment,⁴⁰ and even in discharge of a higher security, such as a note under seal,⁴¹ or a judgment;⁴² or it may be taken, with other consideration, in payment of an existing debt of smaller amount.⁴³

On the other hand, the debtor's note for a third of the original debt will not be a satisfaction.⁴⁴ So, an agreement to receive part cash and part note, in satisfaction of a debt much larger than the aggregate of both cash and note, is not a payment.⁴⁵ But where such agreement has been made in a compromise beneficial to all parties, and the notes representing the original debt have been surrendered, no action will afterwards lie upon them.⁴⁶ And the debtor's own note and the draft of a third person may be taken in satisfaction, although they are for a smaller amount, and such amount paid in cash by the debtor might not have the same effect.⁴⁷

§ 1513. — Where a surety gives his note in satisfaction of the debt on which he is liable, and it is expressly received as such by the

⁴⁰ *Brewer v. Bank*, 24 Ala. 439; *Kappes v. Lumber Co.*, 1 Ill. App. 280; *Gage v. Lewis*, 68 Ill. 604; *Warring v. Hill*, 89 Ind. 497; *Jewett v. Pleak*, 43 Ind. 368; *Iowa Co. v. Foster*, 49 Iowa, 676; *Abat v. Nolte*, 6 Mart. N. S. (La.) 636; *Burchard v. Frazer*, 23 Mich. 224; *Hunter v. Penland* (Tex. Civ. App.) 32 S. W. 421; *Dougherty v. Hunter*, 54 Pa. St. 380, a duebill; *Wheeler v. Faurot*, 37 Ohio St. 26, obiter. And a note so received will not be presumed not to be payable at bank, *Warring v. Hill*, supra. So, an insurance loss may be satisfied by an order drawn by the agent on the secretary of the company, and received in full satisfaction. *Spooner v. Rowland*, 4 Allen (Mass.) 485.

⁴¹ *Bolt v. Dawkins*, 16 S. C. 198.

⁴² And cancellation of the judgment record may be enforced upon such a payment. *Kusler v. Crofoot*, 78 Ind. 507.

⁴³ *Keough v. McNitt*, 6 Minn. 513 (Gil. 357).

⁴⁴ *Cumber v. Wane*, 1 Strange, 426. But the note of a third person so received would discharge the debt, irrespective of the amount being larger than the note. *Brooks v. White*, 2 Metc. (Mass.) 283.

⁴⁵ *Parrott v. Colby*, 71 N. Y. 597, 6 Hun (N. Y.) 55, the note not being paid.

⁴⁶ *Vinson v. Vives*, 24 La. Ann. 336. And such a note has been held to be good in Indiana, although no other creditor was interested in the composition. *Devou v. Ham*, 17 Ind. 472.

⁴⁷ *Bliss v. Swartz*, 7 Laus. (N. Y.) 186.

creditor, such payment will support an action by him against the principal debtor for exoneration.⁴⁸ So, payment by note will support an action by the party paying for money paid;⁴⁹ or an allegation of payment in a suit brought to enforce a contract for the purchase of goods,⁵⁰ or for breach of warranty of the goods sold.⁵¹ So, where B.'s bond is given to A. to indemnify him against payments to be made for B., and A.'s note is afterwards received by the creditor for such payments, action will lie against B. on the bond before the note is actually paid.⁵²

But where a principal debtor makes part payment of a debt, and gives his note to the surety for his indemnity against the balance, the note will not discharge collateral already held for that purpose by the surety.⁵³ And it has been held that the bond of one joint maker will not be sufficient, until paid, to support an action by such maker against his co-maker for contribution.⁵⁴

Some authorities hold that an express agreement is necessary, in order to make the debtor's note an absolute payment and satisfaction;⁵⁵ especially if it is for a smaller amount,⁵⁶ and given in discharge of a larger note and other debts.⁵⁷ The intention to make a note a satisfaction of the original note or debt must, at least, not be left to mere inference, but must be clearly proved.⁵⁸

⁴⁸ *Witherby v. Mann*, 11 Johns. (N. Y.) 518; *Doolittle v. Dwight*, 2 Metc. (Mass.) 561; *Warring v. Hill*, 89 Ind. 497. And see § 1509, supra.

⁴⁹ *Cornwall v. Gould*, 4 Pick. (Mass.) 444. And see § 1509, supra.

⁵⁰ *Morehouse v. Northrop*, 33 Conn. 380.

⁵¹ *Bach v. Levy*, 101 N. Y. 511, 5 N. E. 345, affirming 50 N. Y. Super. Ct. 519; *Frohreich v. Gammon*, 28 Minn. 476, 11 N. W. 88.

⁵² *Drake v. Porter*, 13 Hun (N. Y.) 658.

⁵³ *Pinney v. Kimpton*, 46 Vt. 80.

⁵⁴ *Maxwell v. Jameson*, 2 Barn. & Ald. 51.

⁵⁵ *Porter v. Talcott*, 1 Cow. (N. Y.) 359; *Appleton v. Kennon*, 19 Mo. 637; *Farrell v. Brown*, 1 McCord (S. C.) 449. So, as to payment of an existing debt. *Brown v. Olmsted*, 50 Cal. 162; *Young v. Hibbs*, 5 Neb. 433. Or of a judgment against the maker. *Riggs v. Goodrich*, 74 Mo. 108. And see 2 Daniel, Neg. Inst. 292; 1 Edw. Bills & N. § 290; 2 Edw. Bills & N. § 752; 2 Pars. Notes & B. 150.

⁵⁶ *Paine v. Voorhees*, 26 Wis. 522.

⁵⁷ *Ripley v. Greenleaf*, 2 Vt. 129.

⁵⁸ *Nightingale v. Chafee*, 11 R. I. 609. But circumstantial evidence is sufficient, *Keel v. Larkin*, 72 Ala. 493; e. g. the issue of a renewal policy of insur-

§ 1514. — A note is, of course, no satisfaction of the debt, if it is expressly agreed that it shall not be.⁵⁹ Thus, where notes are given for the accommodation of a builder before completion of his work, with an express agreement that they are not to be credited on account, they will be considered as a loan, and not as a payment, leaving his lien intact for the entire balance due.⁶⁰ So, if a bill is taken with an express reservation of the holder's rights against the drawer of the original bill,⁶¹ or if a note is received as payment "when paid."⁶² And, if a collateral note is given to collect and apply on the original note, it will be a payment only so far as collected.⁶³ So, a debt, released on condition that notes given for it are paid when due, will not be discharged if the holder is obliged to take up the notes.⁶⁴

If the note or renewal is paid at or before maturity, it will be a payment of the debt.⁶⁵ But, if it is given for part of the amount only, the balance may still be recovered, after the note is paid.⁶⁶ If a note held as collateral is paid, it will discharge the debt secured pro tanto.⁶⁷ And the debt may be discharged, although the payment never reaches the creditor's hands; e. g. where the debt is paid by a crossed check to the creditor's agent, and the check is paid to the bank, to which it is crossed, and the amount is held by the bank for a debt due to it from the agent.⁶⁸ On the other hand, if a bill is given to an agent, who is only authorized to receive cash in payment, it will not be a satisfaction, although the bill is afterwards paid to the lawful holder of it.⁶⁹

ance for which the note was given, *Tabor v. Insurance Co.*, 44 Mich. 324, 6 N. W. 830.

⁵⁹ *Gilmore v. Bussey*, 12 Me. 418.

⁶⁰ *Jones v. Keen*, 115 Mass. 170.

⁶¹ *Bedford v. Deakin*, 2 Starke, 178, 2 Barn. & Ald. 210.

⁶² *Herring v. Sanger*, 3 Johns. Cas. (N. Y.) 71.

⁶³ *Haven v. Hathaway*, 20 Me. 345.

⁶⁴ *Lord v. Bigelow*, 124 Mass. 185.

⁶⁵ *Benj. Chalm. Dig.* art. 251; 2 Pars. Notes & B. 163.

⁶⁶ *Lumley v. Musgrave*, 4 Bing. N. C. 9, 5 Scott, 230; *Crawford v. Roberts*, 50 Cal. 235.

⁶⁷ *Marine Bank v. Vail*, 6 Bosw. (N. Y.) 421.

⁶⁸ *Bridges v. Garrett*, L. R. 5 C. P. 451.

⁶⁹ *Sykes v. Gles*, 5 Mees. & W. 645; *Williams v. Evans*, L. R. 1 Q. B. 352; *Catterall v. Hindle*, L. R. 1 C. P. 186.

Pleading Payment by Bill.

§ 1515. Payment by the bill or note of a third person has been held sufficient to support a general plea of payment of the original bill.⁷⁰ But, where the debtor gives his own negotiable note in payment, it has been held to be admissible as evidence under the general issue,⁷¹ but not to be pleadable in bar as a payment.⁷² In pleading payment by bill or note, it is sufficient to aver that it was taken in payment,⁷³ and that the paper is still current, and not due.⁷⁴ But it must be averred that the paper was received in satisfaction.⁷⁵ And it has been held not to be sufficient at common law to set out that the bill was "given on account of and in payment and discharge" of the debt.⁷⁶ And it should appear by the pleading that the bill was payable to order or to bearer, and therefore negotiable.⁷⁷

Satisfaction a Question of Intention.

§ 1516. Whether a bill or note has been taken in satisfaction of a debt is a question of intention for the jury to determine.⁷⁸ And,

⁷⁰ Byles, Bills, 388; *Thorne v. Smith*, 10 C. B. 659. So, an indorser may plead payment and show a renewal taken without his indorsement. *Selman v. Brown*, 78 Ga. 332.

⁷¹ *Hughes v. Wheeler*, 8 Cow. (N. Y.) 77.

⁷² *Roades v. Barnes*, 1 Burrows, 9; *Hughes v. Wheeler*, *supra*. But in *Kirkland v. Dryfus* (Ga.) 29 S. E. 612, a special plea was required.

⁷³ *Maillard v. Argyle*, 6 Man. & G. 40.

⁷⁴ Byles, Bills, 387; 2 Pars. Notes & B. 150; *Kearslake v. Morgan*, 5 Term R. 513; *Griffiths v. Owen*, 13 Mees. & W. 58.

⁷⁵ *Davis v. Gyde*, 2 Adol. & E. 623. In Texas a plea of payment by notes must allege that they were accepted in payment, or that the money had been or could be realized on them. *Gray v. McFarland*, 29 Tex. 163.

⁷⁶ *McDowall v. Boyd*, 17 Law J. Q. B. 295; *Kemp v. Watt*, 15 Mees. & W. 672.

⁷⁷ *James v. Williams*, 13 Mees. & W. 828.

⁷⁸ 2 Daniel. Neg. Inst. 296; 2 Pars. Notes & B. 160; *Lyman v. Bank*, 12 How. 244; *Root v. Burt*, 118 Mass. 521; *Corner v. Pratt*, 138 Mass. 446; *Darnall v. Morehouse*, 45 N. Y. 64; *Howland v. Coffin*, 9 Pick. (Mass.) 52; *Brown v. Scott*, 51 Pa. St. 357; *Dodge v. Emerson*, 131 Mass. 467; *Weakly v. Bell*, 9 Watts (Pa.) 273; *Hunter v. Moul*, 98 Pa. St. 13; *Sykes v. Gerber*, Id. 179; *Seltzer v. Coleman*, 32 Pa. St. 493; *Crabtree v. Rowand*, 33 Ill. 422; *Thom v. Wilson's Ex'r*, 27 Ind. 370; *Weston v. Wiley*, 78 Ind. 54; *First Nat. Bank of New Castle v. Nugen*, 99 Ind. 160; *Bullen v. McGillicuddy*, 2 Dana (Ky.) 90; *Gardner v. Gorham*,

if found to have been so given as a fact, it will extinguish all cause of action on the original debt.⁷⁹ So, it is a question of intention whether a renewal bill or note was received in payment or as a renewal merely,⁸⁰ even where two notes are given for one.⁸¹ So, it is a question for the jury whether the note of an indorser, given to take up the original note of the maker, was intended as a payment.⁸² If a note is given as collateral only, and is so received by the creditor, it may be an extension, but not a payment.⁸³ And if the debtor's own note, payable at the banking house of A., is returned to the debtor before its maturity on A.'s refusal to meet it for want of funds, it will be considered as withdrawn or canceled, and will not be a payment.⁸⁴

Presumption of Payment—Massachusetts Rule.

§ 1517. Where the debtor's own note is given for a precedent debt, it will be presumed not to be a payment, although it is proved by other evidence; but the burden of proof is on the party alleging it to be such.⁸⁵ So, if a nonnegotiable note is received in absolute

1 Dougl. (Mich.) 507; *Dogan v. Ashbey*, 1 Rich. Law (S. C.) 36; *Merrick v. Boury*, 4 Ohio St. 60; *Johnson v. Clarke*, 15 S. C. 72; *Myatts v. Bell*, 41 Ala. 222; *Brugman v. McGuire*, 32 Ark. 733; *Salomon v. Pioneer Co-Op. Co.*, 21 Fla. 374; *McGuire v. Bidwell*, 64 Tex. 43; *Hall's Self-Feeding Cotton-Gin Co. v. Black*, 71 Ga. 450; *Lyons v. Bank*, 86 Ga. 485, 12 S. E. 882; *Stewart Paper Mfg. Co. v. Rau*, 92 Ga. 514, 17 S. E. 748.

⁷⁹ *Govern v. Littlefield*, 13 Allen (Mass.) 127; *Trotter v. Crockett*, 2 Port. (Ala.) 401.

⁸⁰ 2 Daniel, Neg. Inst. 290; 1 Edw. Bills & N. § 286; *Flanagin v. Hambleton*, 54 Md. 222; *Hart v. Boller*, 15 Serg. & R. (Pa.) 162; *Bank of Cadiz v. Slemmons*, 34 Ohio St. 142. So, where the renewal was held by the bank until it matured, and action was then brought on the original note. *Cake v. Bank*, 86 Pa. St. 303.

⁸¹ *Goldshede v. Cottrell*, 2 Mees. & W. 20.

⁸² *Connecticut Trust & Safe-Deposit Co. v. Melendy*, 119 Mass. 449. But there must be an agreement of the parties to effect a payment. It must be taken in liquidation and discharge, and it is not sufficient to aver that it was taken on account of, and appropriated to, and retained for, payment. *Baillie v. Moore*, 8 Q. B. 489.

⁸³ *Byles, Bills*, 387.

⁸⁴ *Stedman v. Gooch*, 1 Esp. 4.

⁸⁵ *Wilbur v. Jernegan*, 11 R. I. 113; *State v. Rosborough*, 2 Rich. Law (S. C.) 241; *Merrick v. Boury*, 4 Ohio St. 60; *Geib v. Reynolds*, 35 Minn. 331, 28 N. W.

payment, the fact must be proved affirmatively.⁸⁶ Satisfaction of a debt by a bill or note is a question of intention, dependent on the agreement of the parties; and the note will not be a payment without such agreement, although credited as such on the book account of the creditor.⁸⁷ And, in general, the debtor's own note will not be considered to be a payment of the debt without strong evidence of an intention to that effect.⁸⁸

In Massachusetts the rule has been laid down (and followed in some other states) that the debtor's own negotiable note is *prima facie* payment of an existing debt.⁸⁹ And, as such, it will extinguish the debt, and take it out of the reach of a subsequent attachment against the debtor.⁹⁰ If the debtor gives his note for an open book account, it has been held to be presumptive evidence of the payment of the account.⁹¹ And the giving of a note is said to be presumptive evidence of a settlement of accounts between the parties up to its date,⁹² although the sufficiency of the note alone as such evidence has been denied.⁹³ If the debtor gives his note to take up an earlier note, it is presumptively a payment of the origi-

923; *Foster v. Hill*, 36 N. H. 526; *Aultman v. Jett*, 42 Wis. 488; *Aultman v. Hetherington*, Id. 622; *Preston v. Jones*, 3 Ill. App. 632; *Estey v. Birnbaum*, 9 S. D. 174, 68 N. W. 290. So, where the payor gave a bond and mortgage, and said they were good, and if not he should feel bound to make them so. *Gardner v. Gorham*, 1 Dougl. (Mich.) 507.

⁸⁶ *Olvey v. Jackson*, 106 Ind. 236, 4 N. E. 149.

⁸⁷ *Follett v. Steele*, 16 Vt. 30.

⁸⁸ *Shepard v. Allen*, 16 Kan. 182.

⁸⁹ *Benj. Chalm. Dig.* art. 251; 2 Daniel, *Neg. Inst.* 285; 2 *Edw. Bills & N.* § 753; 2 *Paras. Notes & B.* 150; *Thacher v. Dinsmore*, 5 Mass. 299; *Maneely v. McGee*, 6 Mass. 143; *Inhabitants of Bangor v. Inhabitants of Warren*, 34 Me. 324; *Ward v. Bourne*, 56 Me. 161; *Bunker v. Barron*, 79 Me. 62, 8 Atl. 253; *Stephens v. Thompson*, 28 Vt. 77; *Wemet v. Lime Co.*, 46 Vt. 458; *Arnold v. Sprague*, 34 Vt. 402; *Thornton v. Williams*, 14 Ind. 518; *Weston v. Wiley*, 78 Ind. 54; *Smith v. Bettger*, 68 Ind. 254. And proof of express agreement is unnecessary. *White v. Jones*, 38 Ill. 159.

⁹⁰ *Wood v. Bodwell*, 12 Pick. (Mass.) 268.

⁹¹ *Taft v. Boyd*, 13 Allen (Mass.) 84; *Hoodless v. Reid*, 112 Ill. 105; *Gooding v. Morgan*, 37 Me. 419; *Tisdale v. Maxwell*, 58 Ala. 40.

⁹² *Maynard v. Johnson*, 4 Ala. 116; *Gaskin v. Wells*, 15 Ind. 253; *Rowe v. Collier*, 25 Tex. Supp. 252. So, a negotiable note given for building material on a general account for several buildings. *Hill v. Sloan*, 59 Ind. 181.

⁹³ *Rosencrantz v. Mason*, 85 Ill. 262.

nal note in Massachusetts,⁹⁴ unless such presumption would lead to loss on the payee's part of advantages inherent in the old note,—e. g. under the insolvent laws,—which the creditor had no intention or thought of abandoning.⁹⁵ Even if the renewal is for less than the original note, it has been held to be presumptive evidence of satisfaction.⁹⁶ But the rule of presumption of payment has not been extended to nonnegotiable notes.⁹⁷

The presumption of payment has been extended to a note given for a debt contracted at the time; e. g. for an insurance premium.⁹⁸ So, if a note is given for goods sold, and the goods are left as collateral, and the note partly paid out of the proceeds, the note will be regarded as payment, if it has been so received.⁹⁹ But an agreement to receive a note as absolute payment for goods purchased at the time will not be presumed, where the maker has become insolvent before its maturity.¹⁰⁰

Presumption of Payment—Rebutted.

§ 1518. A bill or note is, however, even by the Massachusetts rule, only a presumptive payment, in the absence of all proof as to the agreement.¹⁰¹ The presumption may be rebutted by evidence to the contrary.¹⁰² Thus, the note may be shown to have been given as

⁹⁴ *Goodnow v. Hill*, 125 Mass. 587; *Taft v. Boyd*, 13 Allen, 84. But see *Tisdale v. Maxwell*, 58 Ala. 40.

⁹⁵ *Tucker v. Drake*, 11 Allen (Mass.) 145.

⁹⁶ *Piper v. Wade*, 57 Ga. 223.

⁹⁷ *Smith v. Bettger*, 68 Ind. 254; *Bartlett v. Mayo*, 33 Me. 518; *Weston v. Wiley*, 78 Ind. 54; *Travellers' Ins. Co. v. Chappelow*, 83 Ind. 429.

⁹⁸ *Union Ins. Co. v. Grant*, 68 Me. 229; *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7.

⁹⁹ *Jones v. Kennedy*, 11 Pick. (Mass.) 125.

¹⁰⁰ *Bill v. Porter*, 9 Conn. 23.

¹⁰¹ *Amos v. Bennett*, 125 Mass. 123; *Rindge v. Breck*, 10 Cush. (Mass.) 43; *Krutsinger v. Brown*, 72 Ind. 466; especially where a collateral bond is taken, *Appleton v. Parker*, 15 Gray (Mass.) 173. So, too, even where a receipt is given for the payment. *Milliken v. Whitehouse*, 49 Me. 527.

¹⁰² *Appleton v. Parker*, *supra*; *Dodge v. Emerson*, 131 Mass. 467; *Green v. Russell*, 132 Mass. 536; *Melledge v. Iron Co.*, 5 Cush. (Mass.) 158; *Butts v. Dean*, 2 Metc. (Mass.) 76; *Curtis v. Hubbard*, 9 Metc. (Mass.) 322; *Maneely v. McGee*, 6 Mass. 143; *Paine v. Dwinel*, 53 Me. 52; *Miller v. Hilton*, 88 Me. 429, 34 Atl. 266; *Morrison v. Smith*, 81 Ill. 221; *Maynard v. Johnson*, 4 Ala. 116.

collateral only.¹⁰³ And where it has been given as collateral, and afterwards taken up by the creditor, and surrendered to the maker, it is not a payment.¹⁰⁴ And the presumption of payment is rebutted where the payee has sold goods to A., and taken his note for them, not knowing him to be only an agent.¹⁰⁵ So, it may be rebutted by circumstantial evidence; e. g. by showing that it was the note of an agent not charged to his principal, and given "on account of vessel's bills," for the evident purpose of a temporary accommodation merely.¹⁰⁶ And, although a receipt is given for the debt on taking a negotiable note of the debtor, it is only *prima facie* payment, and may be rebutted.¹⁰⁷

Parol evidence is admissible to show the intention with which the note was given,¹⁰⁸ and whether it was given for some other consideration or in satisfaction of an earlier debt or note.¹⁰⁹ But, where the consideration is expressed in the note, it has been held inadmissible to show that it was given as a settlement of some other account.¹¹⁰ And a note will not be presumed to be taken in payment where some other security held by the creditor would be lost thereby;¹¹¹ e. g. where it is given for an extension of time on a debt secured by mortgage,¹¹² or for a bond covering both past and future indebtedness, and signed by a surety also.¹¹³

¹⁰³ *Collamer v. Langdon*, 29 Vt. 32; *White v. Jones*, 38 Ill. 159.

¹⁰⁴ *Dickinson v. King*, 28 Vt. 378.

¹⁰⁵ *Lovell v. Williams*, 125 Mass. 439; *Wemet v. Lime Co.*, 46 Vt. 458.

¹⁰⁶ *Hudson v. Bradley*, 2 Cliff. 130, Fed. Cas. No. 6,833.

¹⁰⁷ *Fowler v. Ludwig*, 34 Me. 455.

¹⁰⁸ 2 *Daniel*, Neg. Inst. 286; 2 *Pars. Notes & B.* 150; *Graves v. Shulman*, 59 Ala. 406; *Weston v. Wiley*, 78 Ind. 54; *First Nat. Bank of New Castle v. Nugen*, 99 Ind. 160. And proof may be made of usage and circumstances to rebut the presumption of payment. *Varner v. Nobleborough*, 2 Me. 121.

¹⁰⁹ *Hale v. Rice*, 124 Mass. 292.

¹¹⁰ *Ross v. Boswell*, 60 Ind. 235.

¹¹¹ 2 *Daniel*, Neg. Inst. 292; 2 *Pars. Notes & B.* 150; e. g. where it would extinguish a prior mortgage, *Bunker v. Barron*, 79 Me. 62, 8 Atl. 253; *Spencer v. Chrisman*, 15 Ind. 215.

¹¹² *Bryce v. Bowers*, 11 Rich. Eq. (S. C.) 41.

¹¹³ *Shumway v. Reed*, 34 Me. 560.

Effect of Receipt.

§ 1519. Where the debtor gives his own note, it does not become an absolute payment by the mere fact that a receipt is given for it as so much cash.¹¹⁴ The effect of such receipt, or of a receipt in full, is a question of intention for the jury to determine.¹¹⁵ But where a note is secured by mortgage, and payable in installments, and the holder, on the maturity of the first installment, takes a new negotiable note for the purpose of raising money on it, and indorses on the original a receipt for the first installment, it has been held to be a payment discharging the mortgage to that extent.¹¹⁶ So, where a bill of exchange has been paid by a note, and a receipt in full given for the bill, it has been held to be a satisfaction of it.¹¹⁷ So, notes given and received "in full satisfaction and discharge," under a bankruptcy composition which the statute required to be made "in cash," will be so regarded, if so intended by the parties.¹¹⁸ So, it has been held that the buyer's note will be presumed to be payment for goods to be delivered, and the vendor's lien will be discharged by his acknowledgment that he "received payment by note."¹¹⁹ And even where the creditor has expressly refused to accept a note as absolute payment, but has taken it from his agent, and given a receipt for it "as collateral," it has been held to be a payment.¹²⁰ So, where the receipt stated that the creditor "received payment by note with the understanding that, if the note is not paid when due, makers are at liberty to give a city acceptance."¹²¹ So, a receipt for a note "in full for principal and interest of bonds and mortgage [made by a third person], which I hereby agree to assign to such party as he may designate."¹²² So, where

¹¹⁴ 2 Daniel, Neg. Inst. 292; 2 Edw. Bills & N. § 752; 2 Pars. Notes & B. 159.

¹¹⁵ Sutton v. Albatross, 2 Wall. Jr. 327, Fed. Cas. No. 13,645; The Charlotte v. Hammond, 9 Mo. 59; Sykes v. Gerber, 98 Pa. St. 179.

¹¹⁶ Fowler v. Bush, 21 Pick. (Mass.) 230.

¹¹⁷ Francia v. Del Banco, 2 Duer (N. Y.) 135.

¹¹⁸ In re Hurst, 1 Flap. 462, Fed. Cas. No. 6,925.

¹¹⁹ Hutchins v. Olcott, 4 Vt. 549.

¹²⁰ Although the agent was not authorized to take the note. Burlington Gas Light Co. v. Greene, 22 Iowa, 508.

¹²¹ Walton v. Bemiss, 16 La. 140.

¹²² Although it may be explained otherwise by parol evidence, Meyer v. (2186)

a judgment is rendered against A., and another judgment against A. and B., and the joint note of A. and B. is received by the plaintiff, and receipt in full given for so much money for both judgments, the judgments will be thereby satisfied.¹²³

On the other hand, where money is received from the discount of a note, to be applied on account of another note, if the first is paid, a receipt for the money indorsed on the note may be explained and shown not to discharge it.¹²⁴ And even a receipt for a draft "in full" has been held not to be evidence of an absolute payment.¹²⁵ So, without additional evidence of an agreement, a receipt for a note "in payment of the account";¹²⁶ or a receipt of "payment by A.'s note," given to enable the parties to balance their books, with an agreement that it should not be a payment unless paid.¹²⁷ And where the holder of a note agrees to receive, in payment of the interest due on it, another note with a surety, and indorses the payment on the first note, but the new note is given without the surety, and is afterwards returned by consent, and the indorsement canceled, it will not amount to a payment on the original note.¹²⁸

Lathrop, 73 N. Y. 315; but to the effect that parol evidence is inadmissible to show that a note was given in absolute payment, where a receipt was given, see *Courtney v. Hogan*, 93 Ill. 101.

¹²³ *Dogan v. Ashbey*, 1 Rich. Law (S. C.) 36. So, a note may be indorsed as payment on an execution, and so received. *Dole v. Boutwell*, 1 Allen (Mass.) 286.

¹²⁴ *Greenawalt v. McDowell*, 65 Pa. St. 464.

¹²⁵ *Galls v. The Osceola*, 14 La. Ann. 54. So, a note receipted "in full of all claims and accounts," *Dudgeon v. Haggart*, 17 Mich. 273; or of a judgment, *Maze v. Miller*, 1 Wash. C. C. 328, Fed. Cas. No. 9,362. And a note given "in full of demand" for work has been held to be not even presumptive payment. *Doebbling v. Loos*, 45 Mo. 150.

¹²⁶ *Berry v. Griffin*, 10 Md. 27; although at the foot of a statement of the account, *Glenn v. Smith*, 2 Gill & J. (Md.) 494. So, if a note is credited on an account and not paid. *Blackmar v. Cornwell*, 58 Mich. 400, 25 N. W. 324. A memorandum that the amount had been reduced is not evidence of satisfaction or payment. *Mars v. Conner*, 9 S. C. 70. But notes may be credited as a payment, if so intended. *Riley v. Anderson*, 2 McLean, 589, Fed. Cas. No. 11,835.

¹²⁷ *Street v. Hall*, 29 Vt. 165.

¹²⁸ *Hayward v. Billings*, 48 Vt. 355.

Original Note Surrendered.

§ 1520. Even the surrender and cancellation of the original note has been held not to raise the presumption that a renewal given for it was taken in payment.¹²⁹ And this is true of the surrender of the original note for a larger note of the original payee held by the debtor, the payee giving his own note for the difference.¹³⁰ And even the surrender and destruction of the original note upon renewal given is not a payment, unless it is so agreed between the parties.¹³¹

But the cancellation of the original instrument has been held in other cases to show an absolute payment of it.¹³² And where an attorney receives in payment some cash and the maker's note for the balance, and surrenders the original note, it will discharge the surety upon it.¹³³ So, where a note is partly paid in cash, and partly by a new note, and the original collateral is surrendered with it to the maker, it is a payment of the original debt.¹³⁴ So, if a note is paid with the proceeds of a discount of the renewal note, and the original note is surrendered;¹³⁵ or if the note is paid by a bond, and a release given.¹³⁶ And if a note is taken for a judgment, and the execution discharged, it is a prima facie payment.¹³⁷

If the note of a deceased maker is surrendered for the individual note of his executor with a new mortgage, and in the meantime another mortgage has intervened, the first note will be regarded as

¹²⁹ 2 Daniel, Neg. Inst. 290; 2 Pars. Notes & B. 164; First Nat. Bank of Racine v. Case, 63 Wis. 504, 22 N. W. 833. So, Merchants' Nat. Bank v. Good, 21 W. Va. 455, as against a fraudulent transfer of property by the maker between the date of the original note and the renewal.

¹³⁰ Randlet v. Herren, 20 N. H. 102.

¹³¹ Welch v. Allington, 23 Cal. 322. So, if the original instrument is marked "paid and canceled." Belleville Sav. Bank v. Bornman, 124 Ill. 207, 16 N. E. 210.

¹³² Wilkinson v. Stewart, 30 Ill. 48. So, taking a certificate of deposit by agreement in the payee's own name on surrender of a former certificate in the debtor's name. Montgomery v. Schenck, 82 Hun, 24, 31 N. Y. Supp. 42.

¹³³ Livingston v. Radcliff, 6 Barb. (N. Y.) 201.

¹³⁴ Nexsen v. Lyell, 5 Hill (N. Y.) 466.

¹³⁵ Fisher v. Marvin, 47 Barb. (N. Y.) 159.

¹³⁶ Case Wagon Co. v. Wolfenden, 63 Wis. 185, 23 N. W. 485.

¹³⁷ Day v. Stickney, 14 Allen (Mass.) 255.

paid as against the intermediate mortgagee.¹³⁸ So, if the original note is surrendered, and a note of the heirs of one co-maker is received in full satisfaction, the original will be discharged.¹³⁹ But if the negotiable note of an executor, taken for his testator's debt, is void for usury, although the creditor has surrendered the original note and collateral, he may reclaim the collateral as a security for the unpaid debt of the testator.¹⁴⁰

Original Note Retained.

§ 1521. On the other hand, if the original note is retained upon taking a renewal, the renewal will not be presumed to be a satisfaction.¹⁴¹ So, if the original note is renewed at maturity by a second note signed by additional parties, and the original note is retained;¹⁴² or if the original note is partly paid in cash, and the balance is secured by a new note of the indorser in the maker's absence, the old note being still left with the holder.¹⁴³ So, where the holder takes a second bill, with the statement that it is insufficient in amount to cover the interest of the first bill, and retains the first bill, the payment of the second bill will not discharge the unsatisfied interest on the first.¹⁴⁴ And if a note is taken in payment of interest due on another note, to be indorsed on it as such, it is not an unconditional payment of such interest.¹⁴⁵

Renewal with Additional Security.

§ 1522. Where the original debtor's note is taken with the indorsement of a third party, and is received in satisfaction, it will be a settlement of the original debt, although it is for a smaller

¹³⁸ *Lear v. Friedlander*, 45 Miss. 559.

¹³⁹ *Lawson v. Gudgel*, 45 Mo. 480.

¹⁴⁰ *Stebbins v. Smith*, 4 Pick. (Mass.) 97.

¹⁴¹ Although the witness at the time thought that it was so. *McGuire v. Gadsby*, 3 Call (Va.) 234.

¹⁴² *Woods v. Woods*, 127 Mass. 141; *Schmidt v. Livingston*, 16 Misc. Rep. 564, 38 N. Y. Supp. 746.

¹⁴³ *East River Bank v. Butterworth*, 45 Barb. (N. Y.) 476.

¹⁴⁴ *Lumley v. Hudson*, 4 Bing. N. C. 15, 5 Scott. 238.

¹⁴⁵ *Stanton v. Caffee*, 58 Wis. 261, 16 N. W. 601.

amount.¹⁴⁶ So, a note secured by mortgage is sufficient consideration for an accord and satisfaction.¹⁴⁷ So, if a note is given with a waiver of the statutory exemption,¹⁴⁸ or with new sureties, the original note will be paid thereby.¹⁴⁹ So, a renewal with a new indorser will operate as a payment to discharge the original note with its indorsers and collateral.¹⁵⁰ So, where a renewal note with a new surety is discounted, and the proceeds used to take up the old note with a different surety, it will discharge the original note and its surety, although the original note was transferred to the new surety as collateral.¹⁵¹ So, if an action brought on a bond with a surety is dismissed and a new note taken with an indorser, the original surety will be discharged.¹⁵²

Effect of Transfer.

§ 1523. In general, the debtor's own note is not an absolute payment, although it is negotiable and still outstanding, if it has not been transferred by the creditor.¹⁵³ But if the creditor has transferred the bill or note, and it is in the hands of another holder, to whom the debtor thereby becomes liable, it will discharge the original debt.¹⁵⁴ And if the creditor has received the note as collateral,

¹⁴⁶ *Varney v. Conery*, 77 Me. 527, 1 Atl. 683.

¹⁴⁷ *Pulliam v. Taylor*, 50 Miss. 251. But see *Whitley v. Lumber Co.*, 89 Ala. 493, 7 South. 810, where a third person's draft with collateral mortgage was held to be merely a means for obtaining payment.

¹⁴⁸ *Lee v. Green*, 83 Ala. 491, 3 South. 785.

¹⁴⁹ *Barnett v. Reed*, 51 Pa. St. 190.

¹⁵⁰ *Huse v. Alexander*, 2 Metc. (Mass.) 157. So, *Carter, Rice & Co. v. Howard*, 17 Misc. Rep. 381, 39 N. Y. Supp. 1060.

¹⁵¹ *Greening v. Patten*, 51 Wis. 146, 8 N. W. 107.

¹⁵² *Callaway v. Price*, 32 Grat. (Va.) 1.

¹⁵³ *Buckingham v. Walker*, 48 Miss. 609; *Sutliff v. Atwood*, 15 Ohio St. 186; unless the taker has transferred it or is guilty of laches, *McCrary v. Carrington*, 35 Ala. 698.

¹⁵⁴ *Donnelly v. District of Columbia*, 119 U. S. 339, 7 Sup. Ct. 276; *Woolfolk v. Degelos*, 24 La. Ann. 199; especially if it has been paid to his transferee, *Looney v. District of Columbia*, 113 U. S. 258, 5 Sup. Ct. 463; but it must be shown to have been given in payment of the debt or it will not have this effect, *Beecher v. Dacey*, 45 Mich. 92, 7 N. W. 689. Its effect as a payment will date from the time of transfer. *Groff v. Friedline*, 17 Misc. Rep. 352, 39 N. Y. Supp. 1064.

and then transferred it, he will be considered as having thereby elected to take it in absolute payment.¹⁵⁵ And this is true of the transfer by a pledgee, irrespective of the value of the note.¹⁵⁶ So, if the note of a third person is indorsed by the debtor to his creditor as a conditional payment only, and is transferred by the creditor, no action can be brought on the original debt.¹⁵⁷ And a note, taken from a new firm for the debt of the old firm, which is not of itself a payment of the original debt, will become such if it is put into judgment, and then transferred by the creditor, although it is afterwards settled for less than its face.¹⁵⁸

And if a principal pays his factor in bills of exchange, which are sold by the factor with other bills for the purchaser's note, and no notice is given to the principal of the dishonor of the note, but a statement is rendered to him to the effect that the note is paid, it will be an absolute payment of the factor's account against him.¹⁵⁹ So, if a renewal note is transferred by indorsement, and judgment rendered on it in favor of the indorsee, it will bar all action on the original debt, unless it is retransferred to the creditor, and can be surrendered by him.¹⁶⁰ And if a note is received as collateral, and a judgment is recovered on it, and the judgment assigned, and property obtained by the assignee in satisfaction of the judgment, it will satisfy the original debt also.¹⁶¹ And it has been held that a note becomes absolute payment if transferred, although it was received with an agreement that it should not be so.¹⁶²

§ 1524. — It is sufficient for the defendant who has given a bill or note in payment to aver that it is outstanding in the hands of a third person.¹⁶³ And even where a bill is given in renewal of a note, with the agreement that it is to be payment only if paid, if

¹⁵⁵ *Cocke v. Chaney*, 14 Ala. 65.

¹⁵⁶ *Cocke v. Chaney*, *supra*.

¹⁵⁷ *Harris v. Johnston*, 3 Cranch, 311. So, if the note is put into judgment and the judgment transferred. *Bradlee v. Manufactory*, 16 Pick. (Mass.) 347.

¹⁵⁸ *Hill v. Marcy*, 49 N. H. 285.

¹⁵⁹ *Hamilton v. Cunningham*, 2 Brock. 350, Fed. Cas. No. 5,978.

¹⁶⁰ *Teaz v. Chrystie*, 2 E. D. Smith (N. Y.) 621.

¹⁶¹ *Holmes v. Lykins*, 50 Mo. 399.

¹⁶² *Morton v. Austin*, 12 Cush. (Mass.) 389; *Dewey v. Bell*, 5 Allen (Mass.) 165.

¹⁶³ *Byles, Bills*, 387; *Price v. Price*, 16 Mees. & W. 232. But see *Mercer v. Cheese*, 4 Man. & G. 804; *Crisp v. Griffiths*, 2 Crompt., M. & R. 159.

it is afterwards transferred by the creditor, there can be no recovery on the note until the bill is produced and surrendered.¹⁶⁴ So, where a note is given for goods purchased, with the agreement that the title is to pass when the note is paid, and the vendor transfers the note, he cannot afterwards bring trover for the goods on the nonpayment of the note.¹⁶⁵ But, although a note given for the purchase of personal property is in the hands of a bona fide holder, it will be no bar to an action brought by the purchaser against his vendor for breach of contract.¹⁶⁶

Even if a note has been received, however, in payment, and has been transferred by the creditor, it will not be an absolute payment, if it is produced at the trial and offered for surrender;¹⁶⁷ or if it is taken up by the creditor, after having been transferred in the usual course of business.¹⁶⁸

Effect of Loss.

§ 1525. A bill or note will be a satisfaction of the original debt, if it is paid at maturity, or if it is lost by the negligence of the creditor.¹⁶⁹ And the debt has been held to be satisfied absolutely by a note that is lost, although the creditor proves the destruction of the note, and offers indemnity to the maker.¹⁷⁰ The loss of a negotiable bill given for a debt is an answer to an action for the debt as well as to one on the bill.¹⁷¹ If goods purchased are paid for by the purchaser's bill, accepted by a third party, for a larger amount, and the vendor pays the balance in cash, and the bill is subsequently lost, and no further steps taken by the creditor, he can recover only upon clear proof of the loss of the bill.¹⁷² And, if a creditor takes a note as collateral, he will be liable to his debtor for its loss through

¹⁶⁴ *Miller v. Lumsden*, 16 Ill. 161.

¹⁶⁵ *Esty v. Graham*, 46 N. H. 169.

¹⁶⁶ *Crelighton v. Comstock*, 27 Ohio St. 548.

¹⁶⁷ *Burdick v. Green*, 15 Johns. (N. Y.) 247; *McConnell v. Stettinius*, 7 Ill. 707.

¹⁶⁸ *Alcock v. Hopkins*, 6 Cush. (Mass.) 484. So, where the payee procured the renewals to be discounted, and with the proceeds took up the prior note. *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

¹⁶⁹ *Byles, Bills*, 386; 3 & 4 Anne, c. 9, § 7; *Sibree v. Tripp*, 15 Mees. & W. 23.

¹⁷⁰ *Woodford v. Whiteley*, *Moody & M.* 517.

¹⁷¹ *Crowe v. Clay*, 9 Exch. 604.

¹⁷² *Champion v. Terry*, 3 Brod. & B. 295.

his own negligence.¹⁷³ But, if the buyer gives his own note for property purchased, there is no reason why it should be an absolute payment, although it is lost by the creditor, and an action still lies on the original debt upon offer of proper indemnity.¹⁷⁴ So, if a note given for the purchase of land is lost, and it does not appear that it was negotiated or negotiable, the seller may recover in an action for the price.¹⁷⁵

Invalid Bills.

§ 1526. Where a note or bill is given in payment, and is insufficient in law for any reason, it will not be a payment of the debt.¹⁷⁶ Thus, if a note is given for a consideration which is partly illegal, it will not be a payment of the legal debt, and that part of the consideration may still be recovered in an action of assumpsit.¹⁷⁷ And, even in states where a note is presumptive payment, a valid debt will not be merged in, or paid by, a subsequent invalid note.¹⁷⁸ And a void note of a third party, although given at the time of a purchase and with a guaranty, will not bar an action for the price of the goods.¹⁷⁹ Thus, the note of A., given in payment of a note of B., will not be a payment, although B.'s note is surrendered, where A.'s note was made payable "in whatever currency may be legal tender in the Confederate States twenty-four months after peace declared."¹⁸⁰

¹⁷³ *Roberts v. Thompson*, 14 Ohio St. 1.

¹⁷⁴ *Keller v. Singleton*, 69 Ga. 703; *Lazell v. Lazell*, 12 Vt. 443. And such note is no defense, if its destruction is proved. *Tompkins v. Tompkins*, 89 Hun, 608, 34 N. Y. Supp. 1032.

¹⁷⁵ *Lazell v. Lazell*, 12 Vt. 443.

¹⁷⁶ So, where the maker was without legal capacity, *Godfrey v. Crisler*, 121 Ind. 203, 22 N. E. 999; or had no corporate existence, as represented, *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342; or where the payee (a public officer) had no right to accept the check or note, *Inhabitants of Embden v. Bunker*, 86 Me. 313, 29 Atl. 1085; *Houghton v. City of Boston*, 159 Mass. 138, 34 N. E. 93; *Doran v. Phillips*, 47 Mich. 228, 10 N. W. 350; *Turnbull v. Alpena Tp.*, 74 Mich. 621, 42 N. W. 114; or where the consideration was illegal, as in the case of a peddler selling goods without license, *Rash v. Farley*, 91 Ky. 344, 15 S. W. 862.

¹⁷⁷ *Coburn v. Odell*, 30 N. H. 540. And see section 537, *supra*.

¹⁷⁸ *Pecker v. Kennison*, 46 N. H. 488.

¹⁷⁹ *Monroe v. Hoff*, 5 Denio (N. Y.) 360.

¹⁸⁰ *Scott v. Atchison*, 36 Tex. 76.

So, if the creditor accepts an agent's note executed without authority, it will not discharge the principal debtor.¹⁸¹ And if an agent, who is authorized to take a new note with the old sureties, surrenders the old note for a new one with only one of the sureties, the new note (being without consideration) will not be a payment of the old note, or discharge the other sureties.¹⁸² So, if a joint and several note of A. and B. is renewed by a similar note, which is void as to B., because executed for him by A. without his authority, recovery may still be had on the original note, although it was surrendered on taking the renewal.¹⁸³ So, if the debt of a municipal corporation is paid by a draft of the town executed without legal authority, it will not be discharged.¹⁸⁴ In like manner, an unauthorized county warrant will not discharge the county from its liability for the original consideration.¹⁸⁵

Payment by Unstamped Bill.

§ 1527. If a debt is paid by a bill which is not valid for want of a stamp, it will be no satisfaction, unless it is afterwards stamped in accordance with the provisions of the statute.¹⁸⁶ So, the acceptance of a third person without a sufficient stamp will not be a payment, although it would have been paid, if duly presented.¹⁸⁷ So, the debtor's indorsement of the bill of a third person, if not duly stamped, will not pay the debt, although the holder has neglected to give the indorser notice of dishonor.¹⁸⁸ And, where a note is

¹⁸¹ *Emerson v. Manufacturing Co.*, 12 Mass. 237; *Ruffin v. Mebane*, 41 N. C. 507. And action lies on the original debt. *Slocomb v. Lurty*, 1 Hempst. 431, Fed. Cas. No. 12,949.

¹⁸² *Williams v. Martin*, 2 Duv. (Ky.) 491.

¹⁸³ *Leonard v. Society*, 2 Cush. (Mass.) 462. So, *First Nat. Bank of Covington v. Gaines*, 87 Ky. 507, 9 S. W. 396.

¹⁸⁴ *Hussey v. Sibley*, 66 Me. 192.

¹⁸⁵ *Polk v. Board*, 52 Miss. 422. But the creditor cannot disavow the warrant as illegal without offering to return it. *City of Tacoma v. Bank*, 15 Wash. 294, 46 Pac. 256.

¹⁸⁶ *Byles, Bills*, 392; *Gunn v. Bolekow*, 10 Ch. App. 491.

¹⁸⁷ *Wilson v. Vysar*, 4 Taunt. 288.

¹⁸⁸ *Cundy v. Marriott*, 1 Barn. & Adol. 696.

given in payment, which is insufficiently stamped, the original debt may still be proved by the creditor.¹⁸⁹

But, although the holder may recover on the original consideration in such case, it has been held that the note is not admissible as evidence of the debt for want of the stamp.¹⁹⁰ Where, however, a renewal is drawn on the back of the original bill, but not stamped, and the original acceptance is thereupon canceled, the renewal is admissible without a stamp to show that the acceptance was canceled with the drawer's consent.¹⁹¹ And, where a note is given by an agent and is not properly stamped, it may still be admitted to support his action against the principal, on the ground of payment by him, whether it is a collectible note or not.¹⁹² Where an insufficiently stamped draft is given by the payee to A. as a *donatio causa mortis*, and the payee's administrator brings suit on the original debt (treating the draft as void), the maker may bring the draft into court, and stamp it, and so give it validity as the property of A. to defeat the recovery by the payee's administrator.¹⁹³

Payment by Usurious Note or Bill.

§ 1528. The giving of a security which is void for usury is not a valid payment.¹⁹⁴ And an action will still lie on the original debt after taking such a bill or note,¹⁹⁵ or after the usurious renewal of a bill or note originally valid.¹⁹⁶ And suit will lie on the original note in such case, although it has been destroyed.¹⁹⁷ And if the

¹⁸⁹ *Brown v. Watts*, 1 Taunt. 353. And suit brought on it. *Waterbury v. McMillan*, 46 Miss. 635; *Wilson v. Carey*, 40 Vt. 179.

¹⁹⁰ *Wilson v. Kennedy*, 1 Esp. 245; *Humphreys v. Wilson*, 43 Miss. 328.

¹⁹¹ *Sweeting v. Halse*, 9 Barn. & C. 365.

¹⁹² *Hardin v. Branner*, 25 Iowa, 364.

¹⁹³ As to the necessity for a stamp, see chapter 7, *supra*; *Gibson v. Hibbard*, 13 Mich. 214.

¹⁹⁴ *Phillips v. Cockayne*, 3 Camp. 119; *Cook v. Barnes*, 36 N. Y. 520; *Ramsdell v. Soule*, 12 Pick. (Mass.) 126; *Gerwig v. Slitterly*, 56 N. Y. 214; *Mesheke v. Van Doren*, 16 Wis. 319; *Lee v. Peckham*, 17 Wis. 383.

¹⁹⁵ *Central City Bank v. Dana*, 32 Barb. (N. Y.) 296; *Fleischmann v. Stern*, 24 Hun (N. Y.) 265; *Chastain v. Johnson*, 2 Bailey (S. C.) 574.

¹⁹⁶ *Farmers' & Mechanics' Bank v. Joslyn*, 37 N. Y. 353; *Leary v. Miller*, 61 N. Y. 488.

¹⁹⁷ *Hughes v. Wheeler*, 8 Cow. (N. Y.) 77.

original note has been canceled, but not destroyed, it will be admissible as evidence to support a recovery against the maker on the common counts.¹⁹⁸ So, a usurious note, which is void, is no payment, although the original note was surrendered.¹⁹⁹ And, if usury has been actually paid upon the new note, the payment will be credited on the principal debt.²⁰⁰ It has been held, however, that, while such usurious note is still outstanding and not abandoned, an action will not lie upon the original claim.²⁰¹

In the same manner, if the debtor gives the note of a third person, which is void for usury, in payment of the original note, which is surrendered at the time, an action will still lie on the original,²⁰² although the usurious note is indorsed by the debtor "without recourse."²⁰³ So, where the accommodation note of a third person, who was insolvent, is given for other valid notes and bills, and had been issued at a usurious rate of discount, and transferred without indorsement by the debtor, it will not bar a recovery upon the original notes and bills.²⁰⁴ But where the note of a third person, which was originally usurious, is set up by the debtor as a valid satisfaction of the original debt, the creditor receiving it cannot set up the usury to render it void, such defense being 'personal to the original maker.'²⁰⁵

Payment by Altered Bill.

§ 1529. Where the bill given in payment has been rendered void by a material alteration, it will not be a satisfaction of the debt;²⁰⁶ especially where the holder has been induced to take it by fraud.²⁰⁷ But if the altered note is afterwards renewed, and the indorser of the

¹⁹⁸ *Edgell v. Sanford*, 6 Vt. 551.

¹⁹⁹ *Winsted Bank v. Webb*, 39 N. Y. 325.

²⁰⁰ *Gerwig v. Sitterly*, 56 N. Y. 214.

²⁰¹ *Hammond v. Hopping*, 13 Wend. (N. Y.) 505.

²⁰² *Sheppard v. Hamilton*, 29 Barb. (N. Y.) 156.

²⁰³ *Ramsdell v. Soule*, 12 Pick. (Mass.) 126.

²⁰⁴ *Loeschigh v. Blun*, 1 Daly (N. Y.) 49.

²⁰⁵ *Austin v. Chittenden*, 33 Vt. 553.

²⁰⁶ *Sloman v. Cox*, 1 Crompt. & R. 471, 5 Tyrw. 174; *Merrick v. Boury*, 4 Ohio St. 60. But the note should be produced to be canceled. *Morrison v. Welty*, 18 Md. 169.

²⁰⁷ *Martin v. Smith*, 13 Phila. (Pa.) 103.

renewal is liable, it will be a payment of the original note.²⁰⁸ So, if the alteration of the debtor's note is by the payee receiving it, it will discharge the original debt.²⁰⁹

Payment by Forged Bill.

§ 1530. In like manner, payment by a forged note or bill is no payment.²¹⁰ And an action will still lie on the original note, although it has been canceled;²¹¹ or in replevin for the original note surrendered.²¹²

So, if a note is renewed by the maker with a forged indorsement, and the original note is destroyed, an action will still lie on the original.²¹³ And, by accepting a renewal with a forged indorsement, the creditor will not discharge the original indorser or surety.²¹⁴

And if the purchaser of goods pays for them with the note of another, known to be forged, it will not be a valid payment.²¹⁵ So,

²⁰⁸ *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 426.

²⁰⁹ *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1; *Plyler v. Elliott*, 19 S. C. 257; *Sykes v. Gerber*, 98 Pa. St. 179. Especially if it is altered by the holder fraudulently. *Smith v. Mace*, 44 N. H. 553; *Ballard v. Insurance Co.*, 81 Ind. 239. But a payment made for A. by the collector, on account of A.'s taxes, may be recovered on the common counts, although repaid by A.'s note to the collector, which the payee had altered by adding the word "Collector" to the payee's name. *York v. Janes*, 43 N. J. Law, 332. And an action lies for the original consideration, even after judgment on the note in favor of the maker because of an alteration by the payee. *Eckert v. Pickel*, 59 Iowa, 545, 13 N. W. 708.

²¹⁰ *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; *Aldrich v. Jackson*, 5 R. I. 218; *Albright v. Griffin*, 78 Ind. 182; *Emerline v. O'Brien*, 36 Ohio St. 491; *Second Nat. Bank v. Wentzel*, 151 Pa. St. 142, 24 Atl. 1087.

²¹¹ *Goodrich v. Tracy*, 43 Vt. 314; *Eagle Bank v. Smith*, 5 Conn. 71; *Stratton v. McMakin*, 84 Ky. 641, 1 S. W. 590; or surrendered, *First Nat. Bank of Athens v. Buchanan*, 87 Tenn. 32, 9 S. W. 202; or stamped "Paid," *Lyndonville Nat. Bank v. Fletcher*, 68 Vt. 81, 34 Atl. 38. And the holder may recover against the original surety, although the original note was surrendered by mistake. *Lovinger v. Bank*, 81 Ind. 354.

²¹² *West Philadelphia Nat. Bank v. Field*, 143 Pa. St. 473, 22 Atl. 829.

²¹³ *Ritter v. Singmaster*, 73 Pa. St. 400.

²¹⁴ *Allen v. Sharpe*, 37 Ind. 67; *Sandy River Nat. Bank v. Miller*, 82 Me. 137, 19 Atl. 109; *Bowman v. Humphrey* (Ky.) 37 S. W. 150; or an accommodation maker, *Irwin v. Freeman*, 13 Grant, Ch. 465. So, if the surety's signature is forged, it will not be a valid extension. *Kincaid v. Yates*, 63 Mo. 45.

²¹⁵ *Bell v. Cafferty*, 21 Ind. 411, and the vendor may affirm or rescind the sale.

if an execution is marked "Satisfied" upon receipt of a forged note given to be applied in payment, the satisfaction will be set aside as of no effect.²¹⁶ So, an acceptor will still remain liable, although the acceptance has been retired by a forged acceptance discounted for the drawer, and has been returned by the collecting agent canceled.²¹⁷ And, even if the note of a third person is expressly received in payment, it will not be such if the surety's signature on the note was forged without the knowledge of either party.²¹⁸ And, even where an administrator receives a forged note as that of his intestate, it will not be binding as a payment.²¹⁹

If, however, a note is paid by money loaned to the maker by a third person (the proceeds of another note which had been discounted for such third person), it will amount to a payment, although the second note was a forgery, and the maker of the first note will be discharged.²²⁰ And, if the note of a third person is taken in payment with a forged indorsement under a special agreement, no recovery can be had on the original debt until the agreement is rescinded or an offer made to return the note.²²¹ And if a check is paid by the drawee by its own bank notes, which prove to be spurious, the holder will lose his remedy against the drawee by failure for an unreasonable time to return the notes.²²²

Effect of Fraud.

§ 1531. While it is a question of intention whether the debtor's note was taken in absolute payment or not, the intention itself will be defeated by fraud or deceit on the payor's part;²²³ e. g. if the

²¹⁶ *Offutt v. Bank*, 1 Bush (Ky.) 166.

²¹⁷ Notwithstanding a subsequent deposit by the debtor of larger sums which were drawn out again by him. *Bell v. Buckley*, 11 Exch. 631.

²¹⁸ *Pope v. Nance*, 1 Stew. (Ala.) 354; although with the knowledge of the payee's agent, *Egan v. Fuller*, 35 Minn. 515, 29 N. W. 313.

²¹⁹ *Wilson v. Alexander*, 4 Ill. 392.

²²⁰ *Grafton Bank v. Hunt*, 4 N. H. 488.

²²¹ *Coolidge v. Brigham*, 1 Metc. (Mass.) 547.

²²² *Gloucester Bank v. Salem Bank*, 17 Mass. 33.

²²³ *Grimes v. Kimball*, 3 Allen (Mass.) 518. So, where he had obtained an indorser's signature by fraud. *Alpena Nat. Bank v. Greenbaum*, 80 Mich. 1, 44 N. W. 1123. So, where a ship's husband falsely represents himself as
(2198)

debtor knew that the bill was of no value.²²⁴ So, if he gave the note of a third person, fraudulently representing it to be good, when he knew it was not.²²⁵ And in such case an action will lie on the original debt, as though there had been no note given,²²⁶ and without first returning the note.²²⁷ And, if such a note is taken in payment for goods sold, trover will lie for the return of the goods.²²⁸ But, if the holder has proved the note in bankruptcy as a debt against the maker's estate, he cannot afterwards treat the sale as void, and replevy the goods.²²⁹ If the note is in fraud of creditors, an action will still lie on the original agreement, notwithstanding the fraud in the settlement by note.²³⁰

Bill or Note without Value.

§ 1532. If a bill is drawn by the debtor without funds to meet it, it will not be a satisfaction of his debt.²³¹ So, where the drawer was himself indebted to the drawee, and had agreed with him to pay the amount for which the note was drawn.²³² And if a debtor gives in payment the note of a third party, who is insolvent at the time, it will not be a payment, although the insolvency was not known by either party.²³³ This is true, also, if the note was given for an exist-

owner, and his note is taken on the strength of such representation. *Baker v. Draper*, 1 Cliff. 420, Fed. Cas. No. 766.

²²⁴ *Byles, Bills*, 390; 2 *Daniel, Neg. Inst.* 293; 2 *Pars. Notes & B.* 207; *Hawse v. Crowe*, 1 *Ryan & M.* 414; *Puckford v. Maxwell*, 6 *Term R.* 52; *Owenson v. Morse*, 7 *Term R.* 64.

²²⁵ *Willson v. Foree*, 6 *Johns. (N. Y.)* 110; *Bridge v. Batchelder*, 9 *Allen (Mass.)* 394; *Vallier v. Ditson*, 74 *Me.* 553. Although receipted as taken "at his own risk and collect or lose the same without calling on defendant for the money." *Snyder v. Findley*, 1 *N. J. Law*, 48.

²²⁶ *Vallier v. Ditson*, 74 *Me.* 553.

²²⁷ *Bridge v. Batchelder*, 9 *Allen (Mass.)* 394; or any part payment received on the note, *Miller v. Woods*, 21 *Ohio St.* 485.

²²⁸ *Ford v. Atwater*, 1 *Root (Conn.)* 58; *Alexander v. Dennis*, 9 *Port. (Ala.)* 174.

²²⁹ *Seavey v. Potter*, 121 *Mass.* 297.

²³⁰ *Walker v. Mayo*, 143 *Mass.* 42, 8 *N. E.* 873.

²³¹ *Byles, Bills*, 386; *Stedman v. Gooch*, 1 *Esp.* 3; *Kearslake v. Morgan*, 5 *Term R.* 513.

²³² *Tapley v. Martens*, 8 *Term R.* 451.

²³³ *Roberts v. Fisher*, 43 *N. Y.* 159.

ing debt;²³⁴ especially if the creditor offers to return the note within a reasonable time.²³⁵

If one agrees to sell goods to B., and takes the note of A. in payment, and A. fails before the note is offered, it will not be a good tender, unless it was expressly agreed that the seller should take the risk.²³⁶ So, if the goods are sold "to arrive," and A. fails before their arrival, and his notes are greatly depreciated, they need not be received in payment, nor the goods delivered.²³⁷ On the other hand, it has been held that, if a bond is received in absolute payment, it will be a satisfaction, although it proves to be of no value.²³⁸ But this is not so, as we have seen, in the case of bank notes which were of no value when delivered.²³⁹

Payment by Note to Other Person.

§ 1533. Where by agreement, and at the creditor's request, the debtor gives his note in payment to a third person, it is *prima facie* an absolute payment of the debt.²⁴⁰ So, where one partner holds the note of his firm for a debt to him, and afterwards surrenders the note for a new note indorsed to a third person, and subsequently transferred without fraud to the original payee's wife, such novation makes the last note provable as a general debt due to the wife against the insolvent partnership.²⁴¹

But if the debtor draws a note at the creditor's request, payable to a third party, but never delivers it to him, it will not be a payment.²⁴² So, if he accepts an order in favor of a third person, and

²³⁴ *Galoupeau v. Ketchum*, 3 E. D. Smith (N. Y.) 175.

²³⁵ *Robson v. Oliver*, 10 Q. B. 704.

²³⁶ *Roget v. Merrit*, 2 Caines (N. Y.) 117.

²³⁷ *Benedict v. Field*, 16 N. Y. 595. But see, *contra*, *Bicknall v. Waterman*, 5 R. I. 43.

²³⁸ *Schroder's Case*, L. R. 11 Eq. 131. So, where a mortgage is taken, and foreclosed after knowledge of the defective title created by it. *O'Conner v. Hurley*, 147 Mass. 145, 16 N. E. 764.

²³⁹ 1 *Edw. Bills & N.* § 294; 2 *Pars. Notes & B.* 191. See section 1403, *supra*.

²⁴⁰ *Smalley v. Edey*, 19 Ill. 207; whether negotiable or not, *Wise v. Hilton*, 4 Me. 435. So, too, a bond given to such third person. *Huffmans v. Walker*, 26 *Grat. (Va.)* 315.

²⁴¹ *Parsons v. Tillman*, 95 Ind. 452.

²⁴² *Hughes v. Israel*, 73 Mo. 538.

the acceptance is afterwards surrendered.²⁴³ And it has been held that if one purchases goods from A., and gives his note for the price to B., and it is afterwards indorsed to A., and taken up at maturity by a new note indorsed by B. to A., it will not be a payment for the goods.²⁴⁴ So, if the debtor gives his note to A., who indorses it to the creditor, and the maker afterwards has it declared void for usury.²⁴⁵ And, if the debtor's note is given to another as trustee for the creditor, it will not be a payment of the debt,²⁴⁶ but may be merely a memorandum for use in a subsequent settlement.²⁴⁷ So, if it was given to the creditor's agent, and diverted by him to his own use.²⁴⁸

²⁴³ *Bassett v. Sanborn*, 9 Cush. (Mass.) 58.

²⁴⁴ *Stephenson v. Rice*, 12 W. Va. 575.

²⁴⁵ *Johnson v. Johnson*, 11 Mass. 359. But usury in the original debt will not avoid a note made by the debtor to a third person at the creditor's request. *McCoy v. Stranathan*, 24 Ohio St. 486.

²⁴⁶ *National Sav. Bank v. Tranah*, L. R. 2 C. P. 556.

²⁴⁷ *Hughes v. Kearney*, 1 Schoales & L. 132.

²⁴⁸ *Mullins v. Brown*, 32 Kan. 312, 4 Pac. 305.

II. PAYMENT BY NOTE OF OTHER PERSON.

- § 1534. Agreement for Satisfaction.
- 1535. Presumption against Payment.
- 1536. Payment by Note of Partner.
- 1538. — Partnership Renewals.
- 1539. — Dormant and New Partners.
- 1540. — Partnership Notes after Dissolution.
- 1543. Contemporaneous Debt.
- 1545. Previous Debt—Indorsed Notes.
- 1546. — Unindorsed Notes.

Another's Note—Agreement for Satisfaction.

§ 1534. If the debtor gives the note of another person in settlement, it will still be no payment, unless it is so agreed.²⁴⁹ But, if received as absolute payment, it will be so.²⁵⁰ And the agreement to receive it as such may even be implied from subsequent conduct, without proof of any express agreement.²⁵¹ And after a lapse of more than 20 years such an agreement will be presumed.²⁵²

A goldsmith's bill was formerly regarded as money (like the modern bank note), and received as payment at the risk of the taker,²⁵³

²⁴⁹ Glenn v. Smith, 2 Gill & J. (Md.) 493; Stevens v. Anderson, 30 Ind. 391; Kephart v. Butcher, 17 Iowa, 240; or unless the holder is guilty of laches, Tobey v. Barber, 5 Johns. (N. Y.) 68. And a receipt given for the original debt is not itself such an agreement, and will not discharge it or the lien securing it. Allis v. Distilling Co., 67 Wis. 16, 29 N. W. 543.

²⁵⁰ Partee v. Bedford, 51 Miss. 84. So, where the vendor of goods takes a third party's note in payment expressly at his own risk, Hoopes v. Strasburger, 37 Md. 390; or where a novation is intended, Cammack v. Griffin, 2 La. Ann. 175; Cadens v. Teasdale, 53 Vt. 469; Gardner v. Levasseur, 28 La. Ann. 679; or a third person's acceptance is given with collateral, Delafield v. Construction Co., 118 N. C. 105, 24 S. E. 10. So, where the creditor takes judgment on the new note. Dick v. Flanagan, 122 Ind. 277, 23 N. E. 765.

²⁵¹ Hotchin v. Secor, 8 Mich. 494.

²⁵² Shipman v. Cook, 16 N. J. Eq. 251.

²⁵³ Tassell v. Lewis, 1 Ld. Raym. 743. Although presented and refused next day at 9 a. m., Moore v. Warren, 1 Strange, 415; and a fortiori if not presented for three or four days, Crawley v. Crowther, Freem. Ch. 257. As to bank notes, see § 1402, supra.

although the drawer absconded the next day.²⁵⁴ A city certificate may, in like manner, be received in absolute payment and satisfaction.²⁵⁵ And, where a corporation indorses and guaranties to a creditor the note of a third person in payment of the debt, it will extinguish the creditor's statutory right of action against stockholders of the company,²⁵⁶ or against the directors.²⁵⁷ And a note will not bar a suit by attachment,²⁵⁸ or by creditors' bill to set aside a fraudulent conveyance,²⁵⁹ for the original (as an earlier existing) debt.

The note of a third person will even discharge a debt for a larger amount, if it is so received.²⁶⁰ And where it is so received, "if paid at maturity," the condition will be waived by the creditor's receiving payment of the note after maturity.²⁶¹

Presumption against Payment.

§ 1535. There has been said to be no presumption that the note of a third person is taken in absolute payment, but the burden of such agreement is on the debtor.²⁶² And, even where a renewal note

²⁵⁴ *Hill v. Lewis*, Skin. 410.

²⁵⁵ *Pugh v. City of Little Rock*, 35 Ark. 75. But not a county warrant given to an agent who had no authority to receive it. *Herriman v. Shomon*, 24 Kan. 387.

²⁵⁶ *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788.

²⁵⁷ *Novelty Mfg. Co. v. Connell*, 88 Hun, 254, 34 N. Y. Supp. 717.

²⁵⁸ *Robinson v. Leach*, 67 Vt. 128, 31 Atl. 32.

²⁵⁹ *Preston Nat. Bank v. Pierson* (Mich.) 70 N. W. 1013; *Trezevant v. Terrell*, 96 Tenn. 528, 33 S. W. 109, even though it includes a later debt. So, as to debtor's own note. *Stout v. Stout*, 77 Ind. 537.

²⁶⁰ *Sanders v. Bank*, 13 Ala. 353; *Lee v. Oppenheimer*, 32 Me. 253; *Wipperman v. Hardy*, 17 Ind. App. 142, 46 N. E. 537.

²⁶¹ *Conkling v. King*, 10 N. Y. 440.

²⁶² *Smith v. Applegate*, 1 Daly (N. Y.) 91; *White Star Line Steamboat Co. v. Moragne*, 91 Ala. 610, 8 South. 867; *Caldwell v. Hall*, 49 Ark. 508, 1 S. W. 62; *Hunt v. Higman*, 70 Iowa, 406, 30 N. W. 769; *Malpas v. Lowenstine*, 46 Ark. 562; *Cheltenham Stone & Gravel Co. v. Gates Iron Works*, 124 Ill. 623, 16 N. E. 923; *Quimby v. Durgin*, 148 Mass. 104, 19 N. E. 14; *McCartney v. Kipp*, 171 Pa. St. 644, 33 Atl. 233; *Briggs v. Holmes*, 118 Pa. St. 283, 12 Atl. 356. But see, contra, *Shaw v. Insurance Co.*, 69 N. Y. 286; *Hess v. Dille*, 23 W. Va. 90; *Challoner v. Boyington*, 91 Wis. 27, 64 N. W. 422; *Manning v. Lyon*, 70 Hun, 345, 24 N. Y. Supp. 265.

is given with some new names on it, the original note will not be presumed to be paid, if it is retained by the creditor, without proof of an agreement to that effect.²⁶³ So, if a judgment is rendered against the maker and the indorser of a note, and the indorser afterwards gives his note for the amount, it will not discharge the judgment without proof of such agreement.²⁶⁴ In like manner, a certificate of deposit, made by a third person who failed soon afterwards, will not be a payment of the original debt, unless such agreement is proved.²⁶⁵

If several notes are given by A. for B.'s accommodation, indorsed by B., and secured by an equal number of other notes and a mortgage made by B., the mortgage and notes of B. will not discharge A.'s notes, although the first of A.'s notes was surrendered and taken up by the corresponding note of B.²⁶⁶ If the debtor A. gives B.'s note, and agrees to secure it by mortgage, and the mortgage is afterwards given to A. himself, and not to the creditor, as agreed, the creditor may show that the note was not received in satisfaction of the debt.²⁶⁷ And where payment is alleged on the indorser's part by a transfer of other notes and a mortgage as collateral, the burden is on the debtor alleging the payment to prove that the notes and mortgage were taken as such.²⁶⁸ When the note of a third party is taken as collateral, and not collected by the creditor, it will not be an absolute payment, unless so agreed; and the creditor may still recover on the original debt.²⁶⁹ So, where the note is taken as collateral for a previous indorsement;²⁷⁰ or where two notes are taken as collateral for a note by other parties, and one is

²⁶³ *Woods v. Woods*, 127 Mass. 141; *Gordon v. Price*, 32 N. C. 385.

²⁶⁴ *Feamster v. Withrow*, 12 W. Va. 611.

²⁶⁵ *Downey v. Hicks*, 14 How. 240.

²⁶⁶ *Clopper's Adm'r v. Bank*, 7 Har. & J. (Md.) 92.

²⁶⁷ *Thom v. Wilson's Ex'r*, 27 Ind. 370.

²⁶⁸ *Tilford v. Miller*, 84 Ind. 185. The note of a third person transferred to the creditor will be considered only as collateral, and disregarded in a judgment on the original bill, unless an express agreement be shown to receive it in satisfaction. *Caldwell v. Field*, 24 N. J. Law, 150. So, it is not payment if a third person's bond be taken as collateral, and judgment obtained on it. *Sterling v. Trading Co.*, 11 Serg. & R. (Pa.) 179.

²⁶⁹ *Abercrombie v. Mosely*, 9 Port. (Ala.) 145; even without returning the collateral note, *Chapman v. Clough*, 6 Vt. 123.

²⁷⁰ *Austin v. Curtis*, 31 Vt. 64.

transferred and afterwards put into suit, and the other is transferred after judgment recovered on it.²⁷¹

If the note of a third party is taken from the debtor upon his responsibility, it will only be a payment on the implied condition that it is paid at maturity.²⁷² So, if the debtor transfers the note of another, to be credited on account, when it is payable.²⁷³ And even an entry on the creditor's books as payment will not be conclusive, the intention as to payment being still a question of fact.²⁷⁴

Payment by Note of Partner.

§ 1536. If the note of one partner is taken for a partnership debt, it will be a payment, if so received.²⁷⁵ So, too, a note of the partnership taken in satisfaction of a debt of the individual partner.²⁷⁶ If the partner's note is taken for the firm debt, it is in some states a prima facie payment.²⁷⁷ And the partnership will be discharged by such note, taken with the note of a third party as collateral.²⁷⁸ So, if the joint note of A. as principal and B. as surety is taken up by B.'s note, with the express agreement that it shall be a payment.²⁷⁹

Where the note of one partner is given for a debt of the firm, the intention may be indicated by the surrender or retention of the origi-

²⁷¹ *Hawks v. Hinchcliff*, 17 Barb. (N. Y.) 492.

²⁷² *Allen v. Bantel*, 2 Thomp. & C. (N. Y.) 342; *Emery v. Richardson*, 61 Me. 39. In such case, if part is paid, it is a satisfaction to that extent, but no further. *Emery v. Richardson*, supra.

²⁷³ *Cushing v. Wyman*, 44 Me. 121.

²⁷⁴ *Brigham v. Lally*, 130 Mass. 485.

²⁷⁵ *Bonnell v. Chamberlin*, 26 Conn. 487; *Smith v. Turner's Adm'r*, 9 Bush (Ky.) 417; *White v. Rech*, 171 Pa. St. 82, 32 Atl. 1130; *Klippel v. Shields*, 90 Ind. 81; but not unless so received, *Bates v. Rosekrans*, 37 N. Y. 409; *Watson v. Owens*, 1 Rich. Law (S. C.) 111. And whether it has been so received is a question for the jury, *Bonnell v. Chamberlin*, supra; and may be shown as a fact, *Mosley v. Floyd*, 31 Ga. 564. But indorsing a note of one partner on a partnership note as a part payment does not make it such. *Ward v. Howe*, 38 N. H. 35.

²⁷⁶ And it will discharge a mechanic's lien against the partner. *Benneson v. Thayer*, 23 Ill. 317.

²⁷⁷ *Robinson v. Hurlburt*, 34 Vt. 115.

²⁷⁸ *Adams v. Reid*, 56 Ga. 214.

²⁷⁹ *Mims v. McDowell*, 4 Ga. 182.

nal security.²⁸⁰ Thus, if the partnership paper is still held by the creditor, it will not be presumed to be paid by the note of one partner, although the note was indorsed by another party.²⁸¹ So, if a partnership note is secured by the mortgage of one partner, and his individual note is afterwards taken for that and other indebtedness, and the original note and mortgage are retained, they will not be discharged.²⁸² On the other hand, if a joint note is surrendered for the note of one maker with a surety, it will be presumed to be paid by the new note.²⁸³ So, if a partnership note is surrendered, and the aggregate amount of it apportioned among the different partners, and new notes taken from the several partners individually for their shares, it will be a payment, and not a renewal.²⁸⁴ But it has been held that, where one maker claims that the joint note has been satisfied by the other maker's individual note, he must show an express agreement to that effect or a surrender of the original note.²⁸⁵ And, even where the partnership note is surrendered for a new note of one partner, it is sometimes held to be not even *prima facie* satisfaction.²⁸⁶

§ 1537. — Where goods are purchased for a firm either by an agent or partner whose individual note is taken, it will not be a payment, but the firm will still remain liable.²⁸⁷ So, where one of several shipowners gives his individual note for repairs to the vessel;²⁸⁸ or where one master and owner gives a note without authority in the joint name of both owners.²⁸⁹ It has been held, however, that the owners of a vessel will be discharged from liability for supplies by the negotiable note of one owner (the ship's husband),²⁹⁰

²⁸⁰ *Davis' Estate*, 5 Whart. (Pa.) 537.

²⁸¹ *Bedford v. Deakin*, 2 Starkie, 178, 2 Barn. & Ald. 210.

²⁸² But the mortgage may be foreclosed for the amount of the new note. *Kaphan v. Ryan*, 16 S. C. 352.

²⁸³ *Washburn v. Pond*, 2 Allen (Mass.) 474.

²⁸⁴ *Shinkle v. Bank*, 22 Ohio St. 516.

²⁸⁵ *Appeal of Kimberly* (Pa. Sup.) 7 Atl. 75.

²⁸⁶ *Powell v. Blow*, 34 Mo. 485; *Spear v. Atkinson*, 23 N. C. 262.

²⁸⁷ *Duvall v. Wood*, 3 Lans. (N. Y.) 489; unless such is the agreement, *Tyner v. Stoops*, 11 Ind. 22. But see *Carnahan v. Hughes*, 108 Ind. 225, 9 N. E. 79, where the suit was to compel the signature of the other partner.

²⁸⁸ *Higgins v. Packard*, 2 Hall (N. Y.) 547.

²⁸⁹ *Wilkins v. Reed*, 6 Me. 220.

²⁹⁰ *Chapman v. Durant*, 10 Mass. 47.

or by a bill drawn by one owner.²⁹¹ And if goods are sold to a partnership, and the note of one partner is received with full knowledge as to the firm, it has been held sufficient to discharge the other partners.²⁹²

In general, the note of one partner for an existing debt of the firm will not be presumed to be an absolute payment,²⁹³ unless intended²⁹⁴ and agreed.²⁹⁵ And this is true, although the partner's note is discounted, and afterwards taken up by the creditor at maturity.²⁹⁶ And the individual note is no payment of the partnership debt, where there is an express agreement to the contrary.²⁹⁷

Partnership Renewals.

§ 1538. Where a joint note is renewed by the individual note of one maker, the others will not be discharged without an agreement to that effect.²⁹⁸ So, where a partnership note with two sureties is renewed by the note of one partner with the same sureties, upon a representation that it was partnership business, and that the other partner would sign it, it will not be a payment of the original

²⁹¹ *Reed v. White*, 5 Esp. 122.

²⁹² *French v. Price*, 24 Pick. (Mass.) 13.

²⁹³ *Hoflinger v. Wells*, 47 Wis. 628, 3 N. W. 589, and 10 Cent. Law J. 116.

²⁹⁴ *Nichols v. Cheairs*, 4 Sneed (Tenn.) 229; *Tyner v. Stoops*, 11 Ind. 22. So, the note and mortgage of one partner. *Rayburn v. Day*, 27 Ill. 46. So, of a sealed note given by one partner in the partnership name. *Walsh v. Lennon*, 96 Ill. 27.

²⁹⁵ *Van Eps v. Dillaye*, 6 Barb. (N. Y.) 244. And action lies against the original parties, although the note was taken "as in full for" the debt of both. *Muldon v. Whitlock*, 1 Cow. (N. Y.) 290. And, in the absence of proof that it was so taken, the holder cannot claim preference in bankruptcy as an individual creditor of the partner whose note he has taken. *In re Parker*, 6 Sawy. 250, 11 Fed. 397.

²⁹⁶ *Kean v. Dufresne*, 3 Serg. & R. (Pa.) 233.

²⁹⁷ *Spaulding v. Woolen Mill*, 36 Vt. 150.

²⁹⁸ *Hill v. Sleeper*, 58 Ind. 221; *Schollenberger v. Seldonridge*, 49 Pa. St. 83. So, the sealed note of the individual partner. *Chalmers v. Turnipseed*, 21 S. C. 126. So, a note given by one maker before the maturity of a joint note, "to provide for the payment" of the first note. *Bates v. Rosekrans*, 37 N. Y. 409. So, a renewal by one partner in the name of both, whether he is authorized to sign the name of the other or not. *Parker v. Cousins*, 2 Grat. (Va.) 372.

note.²⁹⁹ So, if a note by A. as principal and B. and C. as sureties is renewed by the note of B. and C., it will not discharge A., unless it is so agreed.³⁰⁰ The note of one partner in renewal of a partnership note is not a payment, unless so intended, and the burden of proving such intention is on the partner alleging it.³⁰¹ So, if the original partnership paper is renewed, first by the firm "in liquidation," and afterwards by the paper of the individual partner.³⁰² But if one partner receives consideration from the firm for giving his note in renewal of the firm note, and the latter is surrendered, it will be extinguished, although the renewal note is afterwards surrendered, and the original firm note resumed by the creditor.³⁰³ And if a corporation note is signed by one of its members as maker, and by the others as indorsers, and one of the indorsers is afterwards omitted in a renewal, it will be paid as to him, if the omission was intentional.³⁰⁴

Where a partnership bill is taken for a debt of the firm, and renewed at maturity by the bill of one partner individually, it has been held to be a sufficient payment to discharge the other partner.³⁰⁵ But, where goods are sold to a firm, it is liable for the price, although the creditor has received the individual bill of the only partner who resided in England, and has proved the bill as a debt against him.³⁰⁶ And, *prima facie*, a partnership debt is not paid by the draft or order of one partner upon a third person,³⁰⁷ or upon the firm itself;³⁰⁸ or by one partner's acceptance of a bill drawn on him at the request of the firm.³⁰⁹ But the intention with which such acceptance is received is a question of fact.³¹⁰

²⁹⁹ And, on payment by the surety, he may recover against the partnership. *McKee v. Hamilton*, 33 Ohio St. 7.

³⁰⁰ *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398.

³⁰¹ *Davis v. Desauque*, 5 Whart. (Pa.) 530.

³⁰² *Swire v. Redman*, 1 Q. B. Div. 536.

³⁰³ *Arnold v. Camp*, 12 Johns. (N. Y.) 409.

³⁰⁴ But it is a question for the jury whether he was omitted intentionally. *Slaymaker v. Gundacker*, 10 Serg. & R. (Pa.) 75.

³⁰⁵ *Byles, Bills*, 389; *Evans v. Drummond*, 4 Esp. 89.

³⁰⁶ *Bottomley v. Nuttall*, 5 C. B. (N. S.) 122.

³⁰⁷ *Brill v. Holle*, 53 Wis. 537, 11 N. W. 42.

³⁰⁸ *Dougal v. Cowles*, 5 Day (Conn.) 511.

³⁰⁹ *Proctor v. Marshall*, 18 Tex. 63.

³¹⁰ *Thompson v. Percival*, 5 Barn. & Adol. 925, 3 Nev. & M. 667.

Dormant and New Partners.

§ 1539. Where there is no evidence that the creditor knew of the existence of other partners, his taking the note of one partner for the debt of the firm will not discharge the others, although the account is receipted as paid.³¹¹ And even if goods are sold to A., and his note taken, and judgment recovered on it against him, it will not bar a suit against him jointly with a secret partner afterwards discovered.³¹² So, too, although the creditor has proved the note against the individual maker's estate,³¹³ or although he took it after the dissolution of the firm,³¹⁴ Where the note of one partner is given for a firm debt with the other nominal partner as surety, and the latter is really the agent of a third and dormant partner, recovery may be had against him also, notwithstanding the note.³¹⁵ So, if one partner, by agreement with another and secret partner, gives his individual note for a debt of the partnership (which has no firm name), it will not be discharged by the note.³¹⁶ And if the firm name is that of one partner, who is insolvent, his individual note will not be payment for goods sold to the firm.³¹⁷

If the debt of a firm is paid by the note and renewal of a new firm having the same name, it will not be a payment as to the old firm without proof of an agreement to that effect;³¹⁸ especially where the creditor has no knowledge of the change in the firm.³¹⁹ So, where the new firm whose note is taken has dropped one of the old partners, and taken in one new partner, and there was no intention of discharging the old partner.³²⁰ There may be a valid agreement to take the note of the partners that remain in discharge of the note of the old firm and of the retiring partners, but it will not

³¹¹ *Schemerhorn v. Loines*, 7 Johns. (N. Y.) 310.

³¹² *Sheehy v. Mandeville*, 6 Cranch, 258; *Nichols v. Cheairs*, 4 Sneed, 229.

³¹³ *Smith v. Smith*, 27 N. H. 244.

³¹⁴ *Parker v. Canfield*, 37 Conn. 250.

³¹⁵ *McCreary v. Van Hook*, 35 Tex. 631.

³¹⁶ *Palmer v. Elliot*, 1 Cliff. 63, Fed. Cas. No. 10,690.

³¹⁷ *Bill v. Porter*, 9 Conn. 23.

³¹⁸ *Crane v. McDonald*, 45 Barb. (N. Y.) 354; *First Nat. Bank of Pueblo v. Newton*, 10 Colo. 161, 14 Pac. 428.

³¹⁹ *Buxton v. Edwards*, 134 Mass. 567.

³²⁰ *Archibald v. Argall*, 53 Ill. 307.

be inferred from mere acceptance of the new note.³²¹ And the retiring partners will not be discharged per se by such note or a renewal of it.³²² Thus, a note in the name of a steamer "and owners," signed "A. B., Master," will not discharge retiring owners who were originally liable.³²³ And a partner retiring before the renewal of a partnership note will not be discharged, unless the parties so intend.³²⁴

Partnership Notes after Dissolution.

§ 1540. In general, a firm will not be bound or discharged by a note,³²⁵ or renewal,³²⁶ made after its dissolution. So, if a firm is dissolved by the death of one partner, his estate will not be discharged by a subsequent renewal of the firm note,³²⁷ or by a note of the surviving partners given without such intention in renewal of the firm note;³²⁸ especially where the renewal is in the name of the firm, and the death of the partner is not known to the payee.³²⁹ And, where one agrees to receive the note of a partnership in pay-

³²¹ *Nightingale v. Chafee*, 11 R. I. 609.

³²² *David v. Ellice*, 5 Barn. & C. 196; *Kirwan v. Kirwan*, 2 Crompt. & M. 617, 4 Tyrw. 591.

³²³ *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595.

³²⁴ *Bank of Hamilton v. Mudgett*, 34 Hun (N. Y.) 100.

³²⁵ *Perrin v. Keene*, 19 Me. 355; especially if taken without knowledge of the dissolution, *Gardner v. Conn*, 34 Ohio St. 187; *Turnbow v. Broach*, 12 Bush (Ky.) 455; although given with the knowledge of the other partner, *Norton v. Oil Can Co.*, 98 Ga. 468, 25 S. E. 501. If the partner signs "in liquidation," it is notice of the dissolution. *Haddock v. Crocheron*, 32 Tex. 276.

³²⁶ And such renewal will not let in a defense by the partnership which was not available on the original partnership note; e. g. that it was given for an individual debt of one partner. *Boyd v. McCann*, 10 Md. 118. And see § 432. *supra*.

³²⁷ *Burris v. Whitner*, 3 S. C. 510; *In re Clap*, 2 Low. 226, Fed. Cas. No. 2,784; *National Exch. Bank v. Willgus*, 95 Ky. 309, 25 S. W. 2; especially where the original note is retained, *Hayward v. Burke*, 151 Ill. 121, 37 N. E. 846.

³²⁸ *Tillotson v. Tillotson*, 34 Conn. 335.

³²⁹ *First Nat. Bank v. Morgan*, 6 Hun (N. Y.) 348, affirmed 73 N. Y. 593. But, if the note has been fraudulently renewed by one partner after dissolution of the firm, an assignee of the note cannot sue for the original debt without proof of his own good faith and that of his assignor. *Ridgeway v. Raymond*, 82 Iowa, 502, 48 N. W. 944.

ment, he need not accept the note of one partner offered after dissolution of the firm, and repudiated by the other partners.³³⁰ And one who suffers himself to be held out as a partner after dissolution of the firm will not be discharged by a note afterwards given by the remaining partner.³³¹

§ 1541. — The note of one partner given for a partnership debt after its dissolution will not be a satisfaction, unless received as such,³³² although the creditor knew that the firm was dissolved.³³³ So, if the firm business is continued by a new firm, to which the account of the old firm is transferred, a note subsequently given by one of the partners for both new and old accounts will not be a payment of the account of the old firm, unless so agreed.³³⁴ And when judgment is recovered against a firm, and one partner assumes the debts upon its dissolution, and agrees to pay the judgment, which is guaranteed by the other partner, the judgment will not be discharged by his note or by a judgment rendered on it without agreement to that effect.³³⁵

If the note of the old firm is not surrendered, it will not be discharged by a renewal given after dissolution by the partner who continued to carry on the firm business.³³⁶ And the creditor may expressly reserve his rights against the firm, although he knew of the dissolution and assumption by one partner of the firm debts, and took his note for the debt.³³⁷ If a firm note with a surety is renewed by the individual note of one partner after its dissolution with the same surety, and is paid by such surety, the firm will still remain liable to him.³³⁸ And it has been held that an express agreement to take the new note of one partner as payment of the firm note

³³⁰ *Goodspeed v. Plow Co.*, 45 Mich. 237, 7 N. W. 810.

³³¹ *Walt v. Brewster*, 31 Vt. 516.

³³² *Medberry v. Soper*, 17 Kan. 369; *Leach v. Church*, 15 Ohio St. 169; *Seward v. L'Estrange*, 36 Tex. 295. So, the note of a surviving partner, although receipted for as a payment. *Thompson v. Briggs*, 28 N. H. 40.

³³³ *Rosseau v. Cull*, 14 Vt. 83.

³³⁴ *Mason v. Wickersham*, 4 Watts & S. (Pa.) 100.

³³⁵ *Clafin v. Ostrom*, 54 N. Y. 581.

³³⁶ *Parham Sewing Mach. Co. v. Brock*, 113 Mass. 194.

³³⁷ *Vernam v. Harris*, 1 Hun (N. Y.) 451.

³³⁸ *Leabo v. Goode*, 67 Mo. 126.

after its dissolution, without new consideration, is insufficient to discharge the old firm.³³⁹

§ 1542. — After dissolution of a partnership, the note of an individual partner may be received on an agreement to discharge the others; and such agreement may be implied from the conduct of the parties,³⁴⁰ or even, it has been held, from the fact that the creditor knew of the dissolution when he accepted the partner's note.³⁴¹ So, where a partner's note is given long after the dissolution, and the creditor indorses a receipt on the original bill for "the within amount, per bill of A."³⁴² So, where the creditor receives part cash and note of a third party, and the note of one partner for the balance;³⁴³ or the note of one partner with the indorsement of a third party;³⁴⁴ or the notes of the individual partners for their several shares, with an express agreement for their discharge as to the balance.³⁴⁵

Where one partner assumes the business and debts of the firm upon its dissolution, its debt has been held to be paid by his individual note,³⁴⁶ or the note of a third party, indorsed by him, and subsequently put into judgment against the maker.³⁴⁷ So, where a partner assumes the firm debts, and informs the creditor of that fact, and the creditor's account is continued with the new firm, and he afterwards accepts such partner's note for the balance due on both accounts.³⁴⁸

³³⁹ *Cole v. Sackett*, 1 Hill (N. Y.) 516.

³⁴⁰ *Bank v. Green*, 40 Ohio St. 431. And bringing suit on the note is evidence of such agreement. *Ricker v. Adams*, 59 Vt. 154, 8 Atl. 278. But the note of one partner given after dissolution, and accepted in full of a partnership account, will not of itself discharge the firm, *Herring v. Sanger*, 3 Johns. Cas. (N. Y.) 71.

³⁴¹ *Stone v. Chamberlin*, 20 Ga. 259.

³⁴² *Anderson v. Henshaw*, 2 Day (Conn.) 272. So, where it is renewed by the surviving partner for several years, and interest paid by him. *Ecker v. Bank*, 59 Md. 201.

³⁴³ *Waydell v. Luer*, 3 Denio (N. Y.) 410, reversing 5 Hill (N. Y.) 448.

³⁴⁴ *Yarnell v. Anderson*, 14 Mo. 619.

³⁴⁵ *Maxwell v. Day*, 45 Ind. 509.

³⁴⁶ *Maler v. Canavan*, 57 How. Prac. (N. Y.) 504; *Reed v. Ashe*, 18 App. Div. 501, 46 N. Y. Supp. 126.

³⁴⁷ *Frisbie v. Larned*, 21 Wend. (N. Y.) 450, unless received as collateral only.

³⁴⁸ *Harris v. Lindsay*, 4 Wash. C. C. 98, 271, Fed. Cas. No. 6,124.

Payment of Contemporaneous Debts.

§ 1543. A fine distinction has sometimes been made between the payment of an existing debt by a bill or note and the use of such paper in paying debts contracted at the time. Thus, it has been held that the bill or note of a third party is presumed to be taken in payment, if received for goods sold, but not if received for an existing debt.³⁴⁹ Where such note is taken in payment of a debt contracted at the time, it has been held that the burden of proof is on the seller to show that it was not taken as an absolute payment.³⁵⁰ But, where a note is transferred by the purchaser under an agreement for "a good and collectible note," it will not be a payment, if the maker is insolvent at the time;³⁵¹ especially if the seller offers to return the note on learning that fact (although after the time for due presentment had expired).³⁵² And the nonnegotiable note of a third party transferred after maturity in payment for goods purchased at the time is not an absolute payment.³⁵³

On the other hand, the note of a third party transferred by indorsement for goods purchased at the time is a payment, if so received.³⁵⁴ And, where the indorser of such a note is discharged from liability on it for want of notice, he will also be discharged from his original liability as purchaser.³⁵⁵ But if a note is indorsed by the

³⁴⁹ *Gibson v. Tobey*, 46 N. Y. 637; *Challoner v. Boyington*, 91 Wis. 27, 64 N. W. 422. But, to the effect that no such distinction is to be made, see *Porter v. Talcott*, 1 Cow. (N. Y.) 359. And see 2 Par. Notes & B. 156; 1 Edw. Bills & N. § 287; 2 Edw. Bills & N. § 752.

³⁵⁰ *Clerk v. Mundall*, 12 Mod. 203; *Noel v. Murray*, 13 N. Y. 167; *Rew v. Barber*, 3 Cow. (N. Y.) 280. But see, contra, *Johnson v. Weed*, 9 Johns. (N. Y.) 310; *Bartsch v. Atwater*, 1 Conn. 409, where the maker became bankrupt before maturity. And the presumption may be rebutted by a contrary agreement either express or implied from subsequent conduct, *Youngs v. Stahelin*, 34 N. Y. 258; although it has been held that an express agreement to the contrary is necessary, *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409.

³⁵¹ *Torry v. Hadley*, 27 Barb. (N. Y.) 192.

³⁵² *Robson v. Oliver*, 10 Q. B. 704.

³⁵³ *Pimley v. Westley*, 2 Bing. N. C. 249, 2 Scott, 423.

³⁵⁴ E. g. by terms of sale to that effect. *Soffe v. Gallagher*, 3 E. D. Smith (N. Y.) 507. And it is a sufficient plea to aver that it was "for and on account of" said debt. *Kearslake v. Morgan*, 5 Term R. 513.

³⁵⁵ *Farr v. Stevens*, 26 Vt. 299.

purchaser without recourse, and the maker is then insolvent, but the note is afterwards declared by the vendor to be satisfactory, it will be a question for the jury whether it was received in satisfaction.³⁵⁶ If a note is not only indorsed over in payment for goods, but guarantied absolutely by the purchaser, he may still be sued on the original debt.³⁵⁷

§ 1544. — When a bill is delivered without indorsement to the vendor in payment for goods sold, it amounts often to a sale of the bill, if taken at the vendor's own option, and (as such) to a payment for the goods.³⁵⁸ And the purchaser will be discharged from further liability, except in case of forgery or fraud.³⁵⁹ So, if the seller takes such a note by delivery from the buyer, under an agreement for payment "in obligations," it will be at his own risk, in the absence of fraud on the part of the purchaser;³⁶⁰ especially if the purchaser has expressly refused to indorse the note.³⁶¹ But it has been held that a certificate of deposit payable to, and indorsed by, a third party, and taken by the vendor from the purchaser, is not a payment; and the fact that the bank issuing the certificate was then solvent is no evidence of an intention to discharge the purchaser.³⁶²

If a note is transferred, however, without indorsement, and the maker is in good credit, but actually insolvent at the time, the purchaser will be discharged.³⁶³ And this has been held, although the insolvency was not known to either party or publicly, and al-

³⁵⁶ *Roberts v. Fisher*, 53 Barb. (N. Y.) 60.

³⁵⁷ *Butler v. Haight*, 8 Wend. (N. Y.) 535.

³⁵⁸ *Byles, Bills*, 391; 2 Dan. 288; 2 Pars. Notes & B. 183; *Camidge v. Allenby*, 6 Barn. & C. 373, 9 Dowl. & R. 391; *Ward v. Evans*, 2 Ld. Raym. 626; *Brown v. Kewley*, 2 Bos. & P. 518; *Guardians of Litchfield Union v. Greene*, 26 Law J. Exch. 140, Hurl. & N. 884; *Smith v. Mercer*, L. R. 3 Exch. 51. So when a third party's note is taken in payment and made payable to the vendor. *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409.

³⁵⁹ *Breed v. Cook*, 15 Johns. (N. Y.) 241; especially where it is receipted as given in "settlement," *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 7 Atl. 802, 10 Eastern Rep. 617.

³⁶⁰ *Hardin v. Kretsinger*, 17 Johns. (N. Y.) 293.

³⁶¹ *Breed v. Cook*, 15 Johns. (N. Y.) 241.

³⁶² Although no steps were taken against the purchaser for a year, *Huse v. McDaniel*, 33 Iowa, 406.

³⁶³ *Long v. Spruill*, 52 N. C. 96.

though the note was transferred at a discount, and was given in part for a previous debt, and in part only for goods sold.³⁶⁴ If the goods are transferred by the first purchaser to a second, and the original vendor takes the note of the latter, he will by novation make him his debtor, and discharge the original purchaser.³⁶⁵

If, however, the purchaser gives in payment the note of a third party, knowing him to be insolvent, and fraudulently representing him to be good, it will not be a payment, although expressly agreed on as such.³⁶⁶ But the vendor, who has been induced by the purchaser's fraud to receive the note, cannot, without proof that it is worthless, maintain an action on the original liability, until he returns the note.³⁶⁷

Note Indorsed for Existing Debt.

§ 1545. If the note of a third party is given for an existing debt, it will be presumed to have been taken as collateral only.³⁶⁸ In Massachusetts such note is presumed to be a payment.³⁶⁹ But in New York it is not a payment, unless taken as such by agreement.³⁷⁰ So, the note of a husband given to a creditor for the wife's debt,³⁷¹ or the note of a widow for a debt of her deceased husband,³⁷² has been held not to be a payment of the debt. In West Virginia the note of a third party, given for a previous debt, is not payment

³⁶⁴ *Day v. Kinney*, 131 Mass. 37.

³⁶⁵ *Barron v. How*, 2 Mart. N. S. (La.) 144. But where notes of the original purchaser, with B. as a surety, were taken and partly paid, and the property was afterwards resold to B., and his note taken in renewal, it was held not to be a payment of the original notes, unless so agreed, *May v. Gamble*, 14 Fla. 467.

³⁶⁶ *Pierce v. Drake*, 15 Johns. (N. Y.) 475.

³⁶⁷ *Estabrook v. Swett*, 116 Mass. 303.

³⁶⁸ At least, there is no presumption that it is more, *Freeman v. Benedict*, 37 Conn. 559; an express agreement being otherwise necessary in *Illinois*, *Wilhelm v. Schmidt*, 84 Ill. 183.

³⁶⁹ *Ely v. James*, 123 Mass. 36.

³⁷⁰ *Spencer v. Ballou*, 18 N. Y. 327; *Tobey v. Barber*, 5 Johns. (N. Y.) 68; *Raynor v. Laux*, 28 Hun (N. Y.) 35; *Potts v. Mayer*, 74 N. Y. 594. So, *Comiskey v. McPike*, 20 Mo. App. 82.

³⁷¹ *Fickling v. Brewer*, 38 Ala. 685.

³⁷² *Hetherington v. Hixon*, 46 Ala. 297.

without an express agreement to that effect.³⁷³ The note of a ship's husband has been held not to discharge the owner's liability for supplies, unless taken with that agreement or to the prejudice of the owners.³⁷⁴ So, if the note of a third person is taken and indorsed on a contract providing for cash payments, it will not be an absolute payment.³⁷⁵

And, although the debtor indorses the note, it will not be an absolute payment, unless so agreed.³⁷⁶ But if the creditor takes such indorsed note voluntarily, in preference to waiting a few days longer for the money, it will be considered a payment.³⁷⁷ A note so indorsed by the debtor may be taken in satisfaction, although it is for a smaller amount than the debt.³⁷⁸ But whether it is an absolute payment is, in general, a question for the jury.³⁷⁹

Unindorsed Note—Novation.

§ 1546. If the purchaser of goods gives a bank note for them on the day of the sale, but some hours afterwards, and the bank issuing the note had already failed some hours before its delivery, without the knowledge of either party, the loss will fall on the party receiving it, where he has held it negligently without circulation or presentment or offer to return it for seven days.³⁸⁰ But where an agent, who was directed to purchase a bill for his principal, purchased it without authority on his individual credit, retaining the principal's money, and giving his own note, although he paid the note at maturity, he was held to be still liable to his principal for the amount

³⁷³ *Poole v. Rice*, 9 W. Va. 73.

³⁷⁴ *Johnson v. Cleaves*, 15 N. H. 332.

³⁷⁵ *Whitaker v. Whitaker*, 4 Hun (N. Y.) 810.

³⁷⁶ *Crocket v. Trotter*, 1 Stew. & P. (Ala.) 446. In such case the indorser of a bill is liable without previous suit brought against the drawer. *Brown v. Jackson*, 2 Wash. C. C. 24, Fed. Cas. No. 2,016.

³⁷⁷ *St. John v. Purdy*, 1 Sandf. (N. Y.) 9.

³⁷⁸ *Le Page v. McCrear*, 1 Wend. (N. Y.) 164. And the debt cannot be kept alive in the holder, for the payor's use, for the purpose of obtaining contribution from the co-maker.

³⁷⁹ *Fulford v. Johnson*, 15 Ala. 385. And it will bar recovery on the original debt, if so intended, in the absence of forgery or other fraud.

³⁸⁰ *Camidge v. Allenby*, 6 Barn. & C. 373.

of the bill which was not paid at maturity, and was not available as an absolute payment of the money advanced.³⁸¹

Although the note of a third party is made directly payable to the creditor, without signature or indorsement of the debtor, and is credited on account, it will not be a payment, if it has not been received as such.³⁸² Making the note payable directly to the creditor does not change its character as a conditional payment only, without an agreement to that effect.³⁸³ But in Massachusetts the simple giving of such a note has been held to be a payment.³⁸⁴ Where A. is indebted to B., and B. to C., A.'s note may be given to C., and accepted in payment of both debts, although not indorsed by B.³⁸⁵ And if the note of a third party, payable directly to the creditor, is received in satisfaction, and a receipt given for it on the original note, "as a compromise for the full payment," it will be sufficient, although less than the amount of the original debt.³⁸⁶ So, if a note made by a third party, payable to bearer, is received from the debtor as a satisfaction, no action will lie against him on the original debt.³⁸⁷ Where a joint judgment against A. and B. is paid by the joint and several note of B. as principal and C. as surety, by express agreement, the judgment is discharged, and cannot be afterwards used against A. in favor of the surety C. on payment of the note by him.³⁸⁸

Indorsed Notes.

§ 1547. Where the debtor indorses the third party's note, it is not an absolute payment, unless expressly agreed or plainly to be inferred.³⁸⁹ On the other hand, if he transfers the bill or note by

³⁸¹ *Hays v. Stone*, 7 Hill (N. Y.) 128.

³⁸² *Whitney v. Goin*, 20 N. H. 354.

³⁸³ *Hunter v. Moul*, 98 Pa. St. 13.

³⁸⁴ *Wiseman v. Lyman*, 7 Mass. 286.

³⁸⁵ *Adams v. Power*, 48 Miss. 450.

³⁸⁶ *Kellogg v. Richards*, 14 Wend. (N. Y.) 116.

³⁸⁷ *Booth v. Smith*, 3 Wend. (N. Y.) 66.

³⁸⁸ *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85.

³⁸⁹ *Byles*, Bills, 163; 2 Daniel, Neg. Inst. 286; *Story*, Prom. Notes, § 117; *Van Wart v. Woolley*, 3 Barn. & C. 439. Notwithstanding an express verbal warranty of the solvency of the maker which is void by the statute of frauds. *Monroe v. Hoff*, 5 Denio (N. Y.) 360.

mere delivery, he will not be liable as a transferrer.³⁰⁰ And if the creditor agrees to take a third party's note, and make him the principal debtor, the original debtor will be thereby discharged.³⁰¹ And if the debtor takes up his note at maturity, and gives the indorser's note for it, without his own indorsement, it will be in payment.³⁰² So, as we have seen, if the note of an original purchaser is surrendered by the vendor, and a new note taken from the later purchaser without indorsement.³⁰³ But when two are jointly liable to pay for a purchase "in satisfactory notes," and one pays his share, and the other sells his interest to C., and indorses C.'s note to the vendor, and such note is not paid, the original purchaser who paid his share will still remain liable for the balance due.³⁰⁴ If the creditor takes the note of an agent by mistake in renewal of the principal's note, thinking it to be his, the principal will still remain liable on the first note.³⁰⁵

If the debtor makes payment by transferring the bill or note of another with his indorsement or guaranty, he will remain liable on it as an indorser or guarantor, with all the rights of such a party.³⁰⁶ But his indorsement will not of itself be a payment of the original debt, or bar an action upon it by the creditor.³⁰⁷ And it has been held that an express agreement to that effect is necessary.³⁰⁸ But,

³⁰⁰ 2 Pars. Notes & B. 183. And see § 748 et seq, supra. Thus, if one transfers the note of a third person without indorsement for corn to be delivered, it is a payment, although the maker became insolvent before the delivery of the corn, and the seller will be liable to the purchaser if he afterwards sells the corn to another. *Long v. Spruill*, 52 N. C. 96.

³⁰¹ *Van Etten v. Troudden*, 1 Hun (N. Y.) 432.

³⁰² *Draper v. Saxton*, 118 Mass. 427.

³⁰³ *Dennis v. Williams*, 40 Ala. 633; *Hess v. Dille*, 23 W. Va. 90. But see *Goodwin v. Coates*, 1 Moody & R. 221.

³⁰⁴ *Yates v. Donaldson*, 5 Md. 389.

³⁰⁵ *Hedge v. McQuaid*, 11 Cush. (Mass.) 352.

³⁰⁶ 2 Daniel, Neg. Inst. 300; 2 Pars. Notes & B. 182. And see § 748 et seq., supra.

³⁰⁷ *Corlies v. Cumming*, 6 Cow. (N. Y.) 181; *McConnell v. Stettinius*, 7 Ill. 707; although receipted on the contract, *Whitaker v. Whitaker*, 4 Hun (N. Y.) 810; and although the note is guarantied as well as indorsed, *Torrey v. Baxter*, 13 Vt. 452.

³⁰⁸ *Crocket v. Trotter*, 1 Stew. & P. (Ala.) 446, the original note being payable by its terms "in cash notes."

in general, where an indorsement is renewed by another indorsement, action can only be brought upon the latter.³⁹⁹ And payment of the bill, even after maturity, will discharge the original debt.⁴⁰⁰ If the draft of a third party is indorsed over by the debtor, and received as payment in full, the debtor will only remain liable in such case on his indorsement.⁴⁰¹ But the fact that a bill so indorsed to the creditor remains for a long time in his hands will not of itself constitute such bill an absolute payment.⁴⁰²

The diligence which is necessary to hold the indorser liable as such has been already considered, and will be considered further in a later part of this chapter.

³⁹⁹ *Curry v. Van Wagner*, 32 Hun (N. Y.) 453.

⁴⁰⁰ *Anderson v. Hillies*, 12 C. B. 490.

⁴⁰¹ *Day v. Thompson*, 65 Ala. 209. But a mortgage for purchase money of land is not paid by the draft of a third party, if the creditor is not guilty of laches, and an action will still lie on the mortgage. *De Yampert v. Brown*, 28 Ark. 166.

⁴⁰² *Clark v. Mundal*, 1 Salk. 124.

III. PAYMENT BY BILL, CHECK, OR ACCEPTANCE.

- § 1548. Payment by Bill.
- 1549. Agreement for Satisfaction.
- 1550. Presumption as to Payment—Intention.
- 1552. Payment by Acceptance of Debtor.
- 1553. — By Acceptance of Other Party.
- 1554. — By Check.
- 1555. — A Question of Intention.
- 1556. Checks as Absolute Payment.
- 1557. Payment by Check of Other Party.
- 1558. — By Check Lost—Certified.
- 1559. Check Taken as Cash—Paid to Holder.

Payment by Bill.

§ 1548. There is no difference between bills and notes as to their effect, when taken in payment of a debt. A bill of exchange, like a note, is not in itself an absolute payment.⁴⁰³ In like manner, if the purchaser of goods gives his draft on a third party for them, it will not be payment if it is dishonored.⁴⁰⁴ And this has been held to be so where the goods were sold in the morning, and a bank draft was given in payment in the afternoon of the same day, and the drawer failed three days later.⁴⁰⁵ If a draft is given for goods purchased, it will be presumed to be a conditional, and not an absolute, payment.⁴⁰⁶

If goods are sold on time bills, and the drawer of the bills fails before the delivery of the goods, the purchaser can only recover

⁴⁰³ *Copland v. Martin*, 9 Sim. 433; *Chitty v. Naish*, 2 Dowl. 511; *Board of Education of Fairport Union Free School v. Fonda*, 77 N. Y. 350; *Gallagher v. Roberts*, 2 Wash. C. C. 191, Fed. Cas. No. 5,195. So, whether return of the draft is tendered, *Morgan v. Bitzenberger*, 3 Gill (Md.) 350; or the payee continues to hold it after dishonor, *Clark v. Mundal*, 1 Salk. 124.

⁴⁰⁴ *Maxwell v. Deare*, 8 Moore, P. C. 363, where the drawee failed before maturity of the draft; *Mauney v. Coit*, 86 N. C. 463.

⁴⁰⁵ *Gibson v. Toby*, 53 Barb. (N. Y.) 191.

⁴⁰⁶ *League v. Waring*, 85 Pa. St. 244; *Haines v. Pearce*, 41 Md. 221. And the burden of proof is on the party alleging it to be more, as a question of fact for the jury. *Haines v. Pearce*, supra. But see, contra, *Schlerl v. Baumel*, 75 Wis. 69, 43 N. W. 724.

nominal damages in a suit on the contract of sale.⁴⁰⁷ And, after such bill is dishonored, he cannot recover the goods in an action of trover.⁴⁰⁸ But, if the purchaser at the time knew that the bill was worthless and would not be paid, the transaction will not amount to a valid sale.⁴⁰⁹

Agreement for Satisfaction.

§ 1549. Payment by bill or draft upon a third person is not an absolute payment, unless there is an agreement to that effect;⁴¹⁰ and some authorities require an express agreement.⁴¹¹ And, if a receipt is given for payment "when paid," it will not be sufficient to prove such agreement.⁴¹² So, a receipt in full "when paid," or "when in funds," although the original evidence of the debt is surrendered at the time.⁴¹³ So, a nonnegotiable order upon a third person and a receipt of the original debt is not a payment without agreement to that effect.⁴¹⁴ And this is true of a bill given "in lieu" of the original bill upon its surrender.⁴¹⁵

A draft will, however, be an absolute satisfaction, if the parties so agree, although drawn against a particular fund.⁴¹⁶ So, a draft on a bank in another city, indorsed by the debtor, and offered and received "in payment of account in full," will be a payment, al-

⁴⁰⁷ *Griffiths v. Perry*, 1 El. & El. 680.

⁴⁰⁸ *Miles v. Gorton*, 2 Crompt. & M. 504.

⁴⁰⁹ But an intention to obtain more credit than he was entitled to is not the same thing. *Noble v. Adams*, 7 Taunt. 59.

⁴¹⁰ *Haines v. Pearce*, 41 Md. 221. So, a bill on the debtor's firm, *Dougal v. Cowles*, 5 Day (Conn.) 511; or a draft taken for a note, *Helme v. Middleton*, 14 La. Ann. 484; or a draft payable out of a particular fund, *Wadlington v. Covert*, 51 Miss. 631. An order upon a third person, payable out of a particular fund to be created is *prima facie* not an absolute payment, and in any case the presumption of payment may be rebutted by evidence that it was taken as collateral only. *Brill v. Hoile*, 53 Wis. 537, 11 N. W. 42.

⁴¹¹ Although credited on account as a payment, *Jennison v. Parker*, 7 Mich. 355.

⁴¹² *Tucker v. Charpentier*, 28 La. Ann. 617; although so receipted and afterwards lost, *Phifer v. Maxwell*, *Id.* 862.

⁴¹³ *Proctor v. Mather*, 3 B. Mon. (Ky.) 353.

⁴¹⁴ *Jose v. Baker*, 37 Me. 465.

⁴¹⁵ *Ex parte Barclay*, 7 Ves. 597.

⁴¹⁶ *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555.

though the bank on which it is drawn afterwards fails; and the debtor will only be liable as indorser of the draft.⁴¹⁷ So, a cash order given by the debtor, and received on condition that the drawee owes the amount.⁴¹⁸ So, a check is paid by the holder receiving from the drawee its draft in payment of the check.⁴¹⁹

Where the defendant pleads that he has given a bill "in satisfaction" of the debt, it has been held to be a good plea.⁴²⁰ But he must allege that it was given and received in satisfaction,⁴²¹ and was negotiable.⁴²² And, even though a formal accord and satisfaction of a sealed instrument required a seal at common law, it has been held that a bill of exchange might be pleaded by the debtor as given in payment of a sealed bond.⁴²³

Presumption as to Payment—Intention.

§ 1550. Where the debtor gives a bill on a third party, and it is not accepted by the drawee, the evidence of an agreement to receive it as payment must be strong.⁴²⁴ And if he pays for goods by an order on a third person for his own convenience, and the drawee has no funds of the drawer in his hands, an action will still lie on the original debt.⁴²⁵ So, if the bill is not accepted or paid by the drawee, it will not be a payment of the debt, although the debtor who drew it afterwards sues upon it in the payee's name, and makes a compromise with the drawee.⁴²⁶

If the bill of the debtor's agent is taken by the creditor under protest, and without any option offered him, it will not be a payment of the debt.⁴²⁷ Thus, where a freight contract provides for pay-

⁴¹⁷ *Day v. Thompson*, 65 Ala. 269.

⁴¹⁸ *Waite v. Vose*, 62 Me. 184.

⁴¹⁹ *Loth v. Mothner*, 53 Ark. 116, 13 S. W. 594.

⁴²⁰ *Hilliard v. Smilh*, Comb. 19.

⁴²¹ *Crisp v. Griffiths*, 2 Crompt., M. & R. 159.

⁴²² *James v. Williams*, 13 Mees. & W. 828.

⁴²³ *Ligon v. Dunn*, 28 N. C. 133.

⁴²⁴ 2 Pars. Notes & B. 158.

⁴²⁵ *Heald v. Warren*, 22 Vt. 410; *McNiel v. McCamley*, 6 Tex. 163.

⁴²⁶ *Graham v. Sykes*, 15 La. Ann. 49.

⁴²⁷ *Byles, Bills*, 389; 2 Daniel, Neg. Inst. 294; *Robinson v. Read*, 9 Barn. & C. 440; *Marsh v. Pedder*, Holt, N. P. 72, 4 Camp. 257; *Indig v. Bank*, 80 N. Y. 100.

ment on delivery of the cargo, a bill given for it by the shipper's agent will not be a payment.⁴²⁸ So, where goods are purchased, and the purchaser's agent gives a bill payable out of the proceeds of their sale.⁴²⁹ In like manner, a bill given by a shipmaster on the owners for supplies furnished will be no bar to an action against the owners for the debt.⁴³⁰

§ 1551. — If, on the other hand, the bill of a third person is voluntarily accepted by the creditor, on reference by the debtor to such third person for payment, it will, in general, be a satisfaction of the debt.⁴³¹ But, as in the case of the note of a third person, the defendant's plea must aver that the bill was taken in satisfaction or payment.⁴³²

And the question is one of intention for the jury. This is so where the consignee of goods buys and remits to his principal a bill on London.⁴³³ So, if the bill of a third person drawn upon another in favor of the creditor is dishonored on its presentment, and the drawer fails the same day, it will not be a payment without clear proof of an agreement to that effect.⁴³⁴ So, the maker of a note will not be discharged by giving the draft of a bank, which is dishonored on presentment.⁴³⁵ And if a purchaser pays for goods by the bill of a third person, and both drawer and acceptor become bankrupt before maturity, the seller may recover the value of the goods from the purchaser, after deducting such dividends as he has received from the drawer's and acceptor's estates.⁴³⁶ So, the draft of a third person, to be credited to the debtor if it proves "available,"

⁴²⁸ *Marsh v. Pedder*, Holt, N. P. 72, 4 Camp. 257.

⁴²⁹ *Wallace v. Agry*, 4 Mason, 336, Fed. Cas. No. 17,006.

⁴³⁰ *Zerrano v. Wilson*, 8 Cush. (Mass.) 424. So, a draft given by the master on the owner for a loan to the master, on which judgment has been recovered against him. *Descadillas v. Harris*, 8 Me. 208. But in Louisiana the taking of such draft from the master operates as a novation. *Hunt v. Boyd*, 2 La. 109.

⁴³¹ *Byles, Bills*, 389; 2 Daniel, Neg. Inst. 295; *Strong v. Hart*, 6 Barn. & C. 100, 9 Dowl. & R. 189, and 2 Car. & P. 55; *Smith v. Ferrand*, 7 Barn. & C. 19, 9 Dowl. & R. 803.

⁴³² *Baillie v. Moore*, 8 Q. B. 489.

⁴³³ *Hardman v. Bellhouse*, 9 Mees. & W. 596.

⁴³⁴ *Weaver v. Nixon*, 69 Ga. 690.

⁴³⁵ *Indig v. Bank*, 80 N. Y. 100.

⁴³⁶ *Ex parte Blackburne*, 10 Ves. 204.

is not a payment in case of its dishonor, although the debtor obtained it from his banker by giving a check, which was charged against him.⁴³⁷

Payment by Acceptance of Debtor.

§ 1552. In like manner, the debtor's own acceptance of a bill is no payment, unless it is so agreed.⁴³⁸ And if it is given for the acceptor's note, and the note is left with the creditor until the bill matures, the presumption will be that the acceptance was not intended as an absolute payment.⁴³⁹ So, the debtor's acceptance is not an absolute payment, where the creditor shows that it was lost before indorsement, and had not been heard from in two years.⁴⁴⁰ So, the debtor's acceptance in favor of another party, to be credited to him if received by such party, will not be a payment if it is not received; and, upon its surrender, the creditor may still sue on the original debt.⁴⁴¹ And, where the debtor gives his acceptance, it cannot be pleaded, before it becomes due, as payment of a bond.⁴⁴²

If, however, the debtor's acceptance is transferred by the creditor, and is outstanding in the hands of an indorsee at the time suit is brought, it will be a conditional payment, and available as such until dishonored.⁴⁴³ So, if the maker of a note pays it by accepting an order drawn on him, it will be a good payment, as against a subsequent indorsee of the note after maturity.⁴⁴⁴ And if an acceptance is renewed by another acceptance for a larger amount, and the renewal is received in full satisfaction, and transferred by the creditor, it will be sufficient to plead such acceptance and renewal without averring payment to the indorsee.⁴⁴⁵

⁴³⁷ *Hodgen v. Latham*, 33 Ill. 344.

⁴³⁸ *Ausable River Boom Co. v. Sanborn*, 36 Mich. 358.

⁴³⁹ *Cooper v. Gibbs*, 4 McLean, 396, Fed. Cas. No. 3,194.

⁴⁴⁰ *Rolt v. Watson*, 4 Bing. 273.

⁴⁴¹ *Tracy v. Pearl*, 20 Vt. 162.

⁴⁴² *Worthington v. Wigley*, 3 Bing. N. C. 454.

⁴⁴³ *Belshaw v. Bush*, 11 C. B. 191.

⁴⁴⁴ *Schuster v. Marden*, 34 Iowa, 181.

⁴⁴⁵ *Lewis v. Lyster*, 2 Crompt. M. & R. 704, 1 Gale, 320.

Acceptance of Other Party.

§ 1553. Where the debtor gives in payment the acceptance of a third party, its effect is still a question of intention for the jury,⁴⁴⁶ although it is presumed under the Massachusetts rule to be a payment.⁴⁴⁷ In other states this presumption is denied, and the question is to be determined purely by the intention. And this is so whether the acceptance is in payment of a previous debt or of one incurred at the time.⁴⁴⁸ So, if a bill drawn by one person is received after the maturity of another's acceptance in absolute satisfaction.⁴⁴⁹ So, if the debt of a partner is paid by an acceptance of his firm, under an agreement for a novation of the debt, the original debt will be paid, and a new joint debt incurred in its stead.⁴⁵⁰ So, if the acceptance of one partner is received for a debt of the partnership, and judgment is rendered on such acceptance.⁴⁵¹

But, in general, whether such acceptance has been received in payment, especially after dissolution of the partnership, is a question for the jury to determine.⁴⁵² Where A.'s acceptance is given in payment of a debt of B., to whom A. was indebted, it is not necessarily an absolute payment.⁴⁵³ So, a consignee's acceptance, taken for a freight bill, without other notice to the consignor than a request for his indorsement (which was refused), will not be a payment, although the contract was for payment of the freight "by approved bills."⁴⁵⁴ So, where the drawee of a check gives a bill on another, which is accepted, but not paid, and both drawer and drawee of the bill, as well as the original debtor, become bankrupt, the creditor may prove his claim, not only against the drawer and drawee of the bill, but also against the original debtor on the check drawn by him, crediting in the latter proof all dividends received under the

⁴⁴⁶ *Alcock v. Hopkins*, 6 Cush. (Mass.) 484.

⁴⁴⁷ *Strang v. Hirst*, 61 Me. 9.

⁴⁴⁸ *Devlin v. Chamblin*, 6 Minn. 468 (Gil. 325).

⁴⁴⁹ *Sard v. Rhodes*, 1 Mees. & W. 153.

⁴⁵⁰ *Ex parte Whitmore*, 3 Mont. & A. 627.

⁴⁵¹ *Nichols v. Burton*, 5 Bush (Ky.) 820.

⁴⁵² *Thompson v. Percival*, 5 Barn. & Adol. 925.

⁴⁵³ *Swinyard v. Bowes*, 5 Maule & S. 62.

⁴⁵⁴ *Taylor v. Briggs*, Moody & M. 28.

former.⁴⁵⁵ The debt of a partnership is, in like manner, not discharged by an acceptance of one partner.⁴⁵⁶ So, it is not a payment, where the maker of a note gives his draft on a third person, which is accepted by the drawee, but not paid on account of his subsequent failure, although he had received security for his acceptance from the drawer.⁴⁵⁷ So, if a city coupon is paid by the treasurer's draft on another town, and such draft is accepted, but not paid, the original debt will revive.⁴⁵⁸

Payment by Check.

§ 1554. A check is not equivalent to money as a medium of payment,⁴⁵⁹ although sometimes spoken of as such. A check, like a note, is only a conditional payment, and discharges the debt if it is paid, and not otherwise.⁴⁶⁰ Thus, if a bill of exchange is presented for payment, and the drawee gives his check for the amount, it will not discharge the bill.⁴⁶¹ So, if the maker of a note gives his

⁴⁵⁵ *Ex parte Blackburne*, 10 Ves. 204.

⁴⁵⁶ Although the agreement of the parties was for payment by the acceptance of either partner at the creditor's option, and no notice of the dishonor of the acceptance was given to the other partner, *In re British & American Steam Nav. Co.*, L. R. 8 Eq. 506; or although given in the absence of the other partner, who was sick, and made payable to and indorsed by the original surety, *Dobson v. Chambers*, 79 N. C. 142.

⁴⁵⁷ *Moye v. Cogdell*, 69 N. C. 93.

⁴⁵⁸ *Short v. City of New Orleans*, 4 La. Ann. 281; *Goldschmidt v. Mayor*, etc., 5 La. Ann. 436.

⁴⁵⁹ *Chit. Bills*, 450; *Moore v. Bartrup*, 2 Dowl. & R. 25, 1 Barn. & C. 5.

⁴⁶⁰ *Everett v. Collins*, 2 Camp. 515; *Olcott v. Rathbone*, 5 Wend. (Mass.) 490; *People v. Baker*, 20 Wend. (N. Y.) 602; *Davison v. Bank*, 57 N. Y. 81; *Syracuse, B. & N. Y. R. Co. v. Collins*, 57 N. Y. 641, affirming 3 Lans. (N. Y.) 29; *Dennie v. Hart*, 2 Pick. (Mass.) 204; *Morris v. Bank*, 106 Ala. 383, 18 South. 11; *Equitable Nat. Bank v. Griffin & Skelley Co.*, 113 Cal. 692, 45 Pac. 985; *Goodwin v. Trust Co.*, 152 Mass. 189, 25 N. E. 100; *Greenwich Ins. Co. v. Oregon Imp. Co.*, 76 Hun, 194, 27 N. Y. Supp. 794; *Hodgson v. Barrett*, 33 Ohio St. 63; *Kilpatrick v. Association*, 119 Pa. St. 30, 12 Atl. 754; *Brown v. Leckie*, 43 Ill. 497; *National Life Ins. Co. v. Goble*, 51 Neb. 5, 70 N. W. 503; *Phillips v. Bullard*, 58 Ga. 256. And, to the same effect, see *Code Ga. § 2867*. And goods so paid for may be reclaimed by the seller. *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281.

⁴⁶¹ *Turner v. Bank*, *42 N. Y. 425; *Kirkham v. Bank*, 26 App. Div. 110, 49 (2226)

check for it;⁴⁶² or if a joint note is surrendered for the worthless check of one joint maker;⁴⁶³ or if a bill for freight is receipted, and a check taken for it on a bank where the drawer has no funds.⁴⁶⁴ So, a check drawn against insufficient funds, and taken on a previous representation by the drawer that it was good, is not a payment.⁴⁶⁵ But where a note was taken up at its maturity by a check of the holder (the sole proprietor of the bank to which the check was payable), and the holder's account was overdrawn at that time, and continued to be so notwithstanding large deposits afterwards made by him, the note will be regarded as paid, if the check was charged up against the holder, and the note entered on the books of the bank as paid after such deposits were made, the holder having afterwards become insolvent.⁴⁶⁶

In general, however, an unpaid check is no payment, although the bank drawn upon was indebted at the time to the drawer.⁴⁶⁷ It may have been given as mere evidence of a loan, with no intention to have it presented for payment; and an action will lie in such case on the common counts for the money lent.⁴⁶⁸ If goods are bought and paid for by the check of a third person, and it was bad when received, but believed by the buyer to be good, and afterwards duly presented and dishonored, it will not be a payment, although the bill for goods was receipted.⁴⁶⁹ And a check is not an absolute payment, although it is deposited and credited to the depositor as cash.⁴⁷⁰

N. Y. Supp. 767. But see *First Nat. Bank of Skowhegan v. Maxfield*, 83 Me. 376, 22 Atl. 479.

⁴⁶² *Woodburn v. Woodburn*, 115 Ill. 427, 5 N. E. 82; especially if the original note and a mortgage securing it are not surrendered or canceled. But the taker of the check must show that he failed to realize on it. *Watkins v. Parsons*, 13 Kan. 426.

⁴⁶³ *Henry v. Conley*, 48 Ark. 271, 3 S. W. 181. So, a check taken from one joint contractor, and judgment rendered against him, is no bar to a suit on an original debt against the other. *Wegg-Prosser v. Evans* [1895] 1 Q. B. 108, affirming [1894] 2 Q. B. 101.

⁴⁶⁴ *Jobbitt v. Goundry*, 29 Barb. (N. Y.) 509.

⁴⁶⁵ *Jones v. Helliger*, 36 Wis. 149.

⁴⁶⁶ *Pratt v. Foote*, 9 N. Y. 463, reversing 12 Barb. (N. Y.) 212.

⁴⁶⁷ *Finney v. Edwards*, 75 Va. 44.

⁴⁶⁸ *Currier v. Davis*, 111 Mass. 480.

⁴⁶⁹ *Weddigen v. Fabric Co.*, 100 Mass. 422.

⁴⁷⁰ *Brown v. Kewley*, 2 Bos. & P. 518.

Payment by Check—A Question of Intention.

§ 1555. A check is not an absolute payment, unless an intention is shown to receive it as such, e. g. by putting it into circulation.⁴⁷¹ But, if received as such, it is a good payment.⁴⁷² And if it is received as cash, and the drawee had funds of the drawer in his hands, it is presumed to be a payment.⁴⁷³ So, if the maker of a note takes it up by a check which is antedated, and includes the amount of a bill of goods, and the note is surrendered, and the bill receipted, it will bar an action on the original debt.⁴⁷⁴ Whether the check is taken as a payment or not is a question for the jury.⁴⁷⁵ And evidence is admissible which tends to satisfy the jury that it was received as cash.⁴⁷⁶ But a receipt is only prima facie evidence of such intention.⁴⁷⁷ So, if a note is surrendered on receiving a check for it, and the check is not paid, an action will lie upon the note.⁴⁷⁸

A check which is invalid for want of a stamp will not avail as a payment.⁴⁷⁹ So, if a check is drawn against a special account in depreciated bills, and is payable in such bills, and the holder refuses to receive them, this will amount to a dishonor, and the drawer will be liable on due notice.⁴⁸⁰ And if the indorser of a note gives his check at the time it matures, to be held by the creditor, and used, if

⁴⁷¹ Strong v. King, 35 Ill. 9.

⁴⁷² Lyon v. Northrup, 17 Iowa, 314; Sutton v. Baldwin, 146 Ind. 361, 45 N. E. 518; Turner v. Bank (Ky.) 39 S. W. 425. And the debtor cannot recover it from the holder, although the consideration which proceeded from a third party afterwards fails. Stedman v. Carstairs, 97 Pa. St. 234.

⁴⁷³ Woodville v. Reed, 26 Md. 179.

⁴⁷⁴ White v. Howard, 1 Sandf. (N. Y.) 81. So, where the original instrument is marked paid and surrendered. Equitable Nat. Bank v. Griffin & Skelley Co., 113 Cal. 692, 45 Pac. 985.

⁴⁷⁵ Smith v. Collins, 115 Mass. 388; Weed v. Snow, 3 McLean, 265, Fed. Cas. No. 17,347; Blair v. Wilson, 28 Grat. (Va.) 165.

⁴⁷⁶ Titus v. Bank, 35 N. J. Law, 588.

⁴⁷⁷ Weed v. Snow, 3 McLean, 265, Fed. Cas. No. 17,347. But see Bailey v. Pardridge, 134 Ill. 188, 27 N. E. 89.

⁴⁷⁸ Olcott v. Rathbone, 5 Wend. (N. Y.) 491.

⁴⁷⁹ Bond v. Warden, 1 Colly. 583.

⁴⁸⁰ Howes v. Austin, 35 Ill. 396.

necessary, after diligent efforts to collect the note from the maker, it will not be considered as a payment.⁴⁸¹

Checks as Absolute Payment.

§ 1556. If a check is duly honored, it will be an absolute payment of the debt for which it is received;⁴⁸² and it is to be considered as a payment until dishonored.⁴⁸³ So, if it is delivered and payable to a third person at the creditor's request, it will be a payment, as against a subsequent attachment of the original debt.⁴⁸⁴

A check tendered in payment as money need not be received as such.⁴⁸⁵ But, if no objection is made except as to the amount, it will be a sufficient tender.⁴⁸⁶ Where the creditor has agreed to accept a smaller amount in satisfaction of a larger debt, if paid within a certain time, the tender of an uncertified check within the time limited may be refused.⁴⁸⁷ And where an agent is liable to his principal for money collected and deposited in bank without direction from him, and the principal receives his draft, and promptly forwards it for payment, it will not discharge the debt, if dishonored.⁴⁸⁸

If the creditor, however, is itself the bank drawn upon, and holds sufficient deposits of the drawer, his check cannot be refused by it, but will be a payment from the time of presentment.⁴⁸⁹ So, a check given to the president of the bank is presumptively a payment in such case, although the bank had removed its deposits to another part of the country before presentment of the check.⁴⁹⁰ And if a bank discounts a note, and the note is paid at maturity by the maker's check, drawn by him against the proceeds of a subsequent discount deposited and credited to him, the check will be a valid

⁴⁸¹ *American Nat. Bank v. Harrison Wire Co.*, 11 Mo. App. 446.

⁴⁸² *Pearce v. Davis*, 1 Moody & R. 365.

⁴⁸³ *Getchell v. Chase*, 124 Mass. 366.

⁴⁸⁴ *Barnard v. Graves*, 16 Pick. (Mass.) 41.

⁴⁸⁵ *Sweet v. Titus*, 4 Hun (N. Y.) 639, 67 Barb. (N. Y.) 327.

⁴⁸⁶ *Jones v. Arthur*, 8 Dowl. 442; *Shipp v. Stacker*, 8 Mo. 145; *Jennings v. Mendenhall*, 7 Ohio St. 258.

⁴⁸⁷ *Harding v. Loan Co.*, 84 Ill. 257.

⁴⁸⁸ *Cartmell v. Allard*, 7 Bush (Ky.) 482.

⁴⁸⁹ *Laubach v. Leibert*, 87 Pa. St. 55.

⁴⁹⁰ *Springfield v. Green*, 7 Baxt. (Tenn.) 301.

payment of the note; ⁴⁹¹ especially if the subsequent discount was for the express purpose of taking up such paper. ⁴⁹²

Payment by Check of Another.

§ 1557. The check of another party, received by the creditor with the debtor's indorsement, will be a payment, ⁴⁹³ unless it was drawn without funds. ⁴⁹⁴ And, in general, such check is only a conditional payment, and the debtor will not be discharged unless he is damaged, although the holder surrenders it for the drawer's draft, giving his debtor notice of that fact. ⁴⁹⁵ So, if the creditor accepts the check of a third person (already twice presented and dishonored) on the debtor's representation that he knew nothing wrong about it, and agrees to try and collect it, and to return it in two or three months if he does not succeed, he may offer to return it sooner, and may recover the amount of his debt. ⁴⁹⁶

Check Lost—Certified.

§ 1558. If a check is taken and lost, and immediate notice is given to the drawer, who requires indemnity, and the bank drawn upon fails during the delay, with funds of the drawer in its hands, the check will be a payment of the debt, and a bar to further action upon it. ⁴⁹⁷ The mere loss of a check will not, however, make it an absolute payment. ⁴⁹⁸ So, if it is lost, and afterwards paid by the bank to a wrongful holder under a forged indorsement. ⁴⁹⁹

If a check is presented by the payee for certification, and is certi-

⁴⁹¹ *In re Phillips*, 132 Mass. 233. And see Gen. St. c. 118, § 87.

⁴⁹² *National Bank of Gloversville v. Wells*, 79 N. Y. 498; although the check was made payable to "notes, &c., or order."

⁴⁹³ *Sellers v. Johnson*, 65 N. C. 104; *Underwriters' Wrecking Co. v. Board of Underwriters*, 35 La. Ann. 803.

⁴⁹⁴ *Fleig v. Sleet*, 43 Ohio St. 53, 1 N. E. 24.

⁴⁹⁵ *Hunter v. Moul*, 98 Pa. St. 13; *Williams v. Costello*, 95 Ala. 592, 11 South. 9; *Holmes v. Briggs*, 131 Pa. St. 233, 18 Atl. 928 (although the holder received dividends on it from the drawer's estate).

⁴⁹⁶ *Martin v. Pennock*, 2 Pa. St. 376.

⁴⁹⁷ *Bevan v. Hill*, 2 Camp. 381.

⁴⁹⁸ *Kermeyer v. Newby*, 14 Kan. 164.

⁴⁹⁹ *Thomson v. Bank*, 82 N. Y. 1.

fied by the bank, it will be an absolute payment, although the bank fails before paying it, since the creditor voluntarily accepts the liability of the bank, instead of payment at the time of presentment.⁵⁰⁰ The certification of a check constitutes a new contract between the holder and the bank.⁵⁰¹ Giving a certified check is not an absolute payment, however, but simply gives the creditor the additional liability of the drawee.⁵⁰²

Check Taken as Cash—Paid to Holder.

§ 1559. If the maker of a note or the acceptor of a bill offers a check in payment, the holder need not surrender the bill or note on such offer; but even if the original note is surrendered, and a check taken for a part payment, and not paid, the note will not be paid.⁵⁰³ And the fact that a check is a conditional payment excludes any set-off which the bank might have against the person presenting the check for payment.⁵⁰⁴ But payment by check to an authorized agent will be regarded as so much cash.⁵⁰⁵ So, if stock is sold and a check taken in payment, it is a "cash sale."⁵⁰⁶

But, if the drawer stops a check at the principal bank on account of an attachment issued after it was drawn, he may still be liable in the attachment suit for the original debt, although the check was afterwards paid in good faith by a branch bank.⁵⁰⁷ But, in general, if a check is paid on its presentment, the debt is paid.⁵⁰⁸

⁵⁰⁰ First Nat. Bank of Jersey City v. Leach, 52 N. Y. 350.

⁵⁰¹ National Commercial Bank v. Miller, 77 Ala. 168.

⁵⁰² Bickford v. Bank, 42 Ill. 238; Born v. Bank, 123 Ind. 78, 24 N. E. 173.

⁵⁰³ Olcott v. Rathbone, 5 Wend. (N. Y.) 490. So, a check given by an accommodation indorser of the note. Heartt v. Rhodes, 66 Ill. 351.

⁵⁰⁴ Brown v. Leckie, 43 Ill. 498.

⁵⁰⁵ Byles, Bills, 389; Sykes v. Giles, 5 Mees. & W. 645; Williams v. Evans, L. R. 1 Q. B. 352. And where a bank as collecting agent receives the drawee's check, which was not then good, but became so by subsequent deposits, and the check is charged, and the bill marked "Paid," and subsequent overdrafts are paid by the bank, the payment is complete, and the collecting bank is liable to its principal for so much money collected. Commercial Bank v. Union Bank, 11 N. Y. 203.

⁵⁰⁶ Gould v. Town of Oneonta, 71 N. Y. 307.

⁵⁰⁷ Cohen v. Hale, 3 Q. B. Div. 371.

⁵⁰⁸ Barnet v. Smith, 30 N. H. 258.

And part payment made in advance by a check that is afterwards paid will take a parol contract out of the statute of frauds.⁵⁰⁹ So, if payment is made to an agent by check, and the check is crossed by him to his own banker, and paid, it will be a payment of the debt, although crossed and diverted by the agent in fraud of his principal.⁵¹⁰ So, if a check is indorsed by the payee's agent without authority, and misappropriated, it will be a sufficient payment, and the drawer of the check will not be further liable to the payee either for the check or for the goods for which it was given.⁵¹¹

⁵⁰⁹ Hunter v. Wetsell, 17 Hun (N. Y.) 135.

⁵¹⁰ Bridges v. Garrett, L. R. 5 C. P. 451.

⁵¹¹ Charles v. Blackwell, 2 C. P. Div. 151; the payment by the bank being protected by 16 & 17 Vict. c. 59, § 19.

IV. EFFECT UPON PRIOR DEBT OR SECURITY.

- § 1560. Diligence Necessary against Drawer.
- 1562. — As to Checks.
 - 1563. — Against Indorsers.
 - 1564. — After Loss—Delay in Suit.
 - 1565. — On Transfer without Indorsement.
 - 1566. Effect of Receiving Check.
 - 1567. Extension by Bill or Note.
 - 1568. — Parties Discharged.
 - 1569. — Action Suspended.
 - 1570. — Other Rights Suspended.
 - 1571. Collateral Security—Effect of Renewal.
 - 1572. Vendor's Lien on Goods—Stoppage in Transitu.
 - 1573. — On Land.
 - 1574. — Note by or to Third Person.
 - 1575. — Other Security.
 - 1576. — Transfer of Note.
 - 1577. Mechanics' Liens.
 - 1579. Maritime Liens.
 - 1581. Action for Original Debt.
 - 1582. — Production and Surrender of Note.
 - 1583. — Original Defenses.
 - 1584. — Original Consideration—Illegality.
 - 1585. — Usury in Original Bill.

Diligence Necessary against Drawer.

§ 1560. Where the creditor receives a bill or draft, and uses due diligence in presenting it and giving notice of dishonor, it will not be a payment of the debt.⁵¹² But, if the debtor is discharged as drawer by the laches of the creditor, it will in general discharge the debt,⁵¹³ whether the bill was originally taken in full satisfac-

⁵¹² Ward v. Evans, 2 Ld. Raym. 928.

⁵¹³ Chamberlyn v. Delarive, 2 Wils. 353; Darnall v. Morehouse, 45 N. Y. 64; Adams v. Darby, 28 Mo. 162; Phoenix Ins. Co. v. Allen, 11 Mich. 501; Brown v. Cronise, 21 Cal. 387; Allan v. Eldred, 50 Wis. 132, 6 N. W. 565; Stam v. Kerr, 31 Miss. 190; Minehart v. Handlin, 37 Ark. 276. And the dishonor of a draft taken as consideration for a contract is no defense to an action for the specific performance of the contract, if the holder has been guilty of laches in presenting it for payment. Woodcock v. Bennet, 1 Cow. (N. Y.) 733.

tion,⁵¹⁴ or merely as collateral.⁵¹⁵ But where, on the protest of a draft, a second draft is given (which is not protested at maturity), it has been held not to discharge the original draft without proof that it was given as payment of it.⁵¹⁶ If an acceptor draws and indorses a new bill, and no notice is given of its dishonor, it will discharge the original acceptance.⁵¹⁷ The creditor's laches in relation to the bill will, in general, discharge the debt, whether the bill was given for an existing debt,⁵¹⁸ or in payment for goods purchased at the time,⁵¹⁹ and although the bill is duly accepted.⁵²⁰ The burden of proving such laches is upon the debtor, if he gives his check on a bank, and it is not paid.⁵²¹ But it has been held that a creditor who takes a draft from his debtor must make proof of his own diligence.⁵²² In England, and in some of the United States, it is expressly provided by statute that a bill of exchange received from a debtor in payment shall be an absolute payment, if the receiver does not "take his due course to obtain payment of it by endeavoring to get the same accepted and paid";⁵²³ or if he fails to make due presentment for acceptance and payment, and to protest, where necessary.⁵²⁴

§ 1561. — But, if an order drawn by the debtor is received in absolute payment of an existing debt, the creditor need not prove notice of nonpayment to the drawer in an action brought upon the original debt;⁵²⁵ especially where protest is waived by the conduct

⁵¹⁴ *Dayton v. Trull*, 23 Wend. (N. Y.) 345.

⁵¹⁵ And drawn on a particular fund. *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555.

⁵¹⁶ *Starr v. Sanford*, 45 Pa. St. 193.

⁵¹⁷ *Bridges v. Berry*, 3 Taunt. 130; although the renewal recites that it is not taken in satisfaction of the original bill, *Reld v. Coats*, 6 Brown, P. C. 264.

⁵¹⁸ *Dayton v. Trull*, 23 Wend. (N. Y.) 345; *Mehlberg v. Tisher*, 24 Wis. 607.

⁵¹⁹ *Jones v. Savage*, 6 Wend. (N. Y.) 658.

⁵²⁰ *Blanchard v. Boom Co.*, 40 Mich. 566; *Grube v. Stille*, 61 Mo. 473.

⁵²¹ *Bradford v. Fox*, 38 N. Y. 289, 39 Barb. (N. Y.) 203.

⁵²² *Phoenix Ins. Co. v. Allen*, 11 Mich. 501.

⁵²³ 3 & 4 Anne, c. 9, § 7. MISSISSIPPI (Ann. Code, § 3513, as to inland bills).

⁵²⁴ NEW JERSEY (2 Gen. St. p. 2604, § 5); SOUTH CAROLINA (1 Rev. St. § 1397).

⁵²⁵ *Farwell v. Salpaugh*, 32 Iowa, 582.

of the drawer;⁵²⁶ or where diligence is excused, because the bill was not drawn against funds of the drawer,⁵²⁷ or because nothing was due from the drawer to the drawee,⁵²⁸ or because the drawer and drawee bore to one another the relation of principal and agent.⁵²⁹ So, if a bill is not legally stamped;⁵³⁰ or if it is non-negotiable.⁵³¹ So, if the bill is taken in payment by an executor without lawful authority, the drawer will be chargeable with notice of the breach of trust, and will therefore not be discharged by want of notice of dishonor.⁵³² And, if a bill is paid partly in cash and partly by another bill with other drawer and acceptor, in an action against the drawer and acceptor of the original bill it will only be necessary to prove the dishonor of the renewal without proof of notice of dishonor as to it.⁵³³

Diligence as to Checks.

§ 1562. A check is, in like manner, not a payment, if the creditor uses due diligence in presenting it and giving notice of dishonor.⁵³⁴ But the drawer will be discharged, as in other cases, by laches on the holder's part;⁵³⁵ e. g. by a delay for several days in making present-

⁵²⁶ Southworth v. Thompson, 10 Helsk. (Tenn.) 10.

⁵²⁷ Spear v. Atkinson, 23 N. C. 262.

⁵²⁸ Stewart v. Millard, 7 Lans. (N. Y.) 373.

⁵²⁹ Moore v. Quint, 44 Vt. 97.

⁵³⁰ Cundy v. Marriott, 1 Barn. & Adol. 696. So, although notice of nonpayment of an unstamped check is given too late. Bond v. Warden, 14 Law J. Ch. 154; 1 Colly. Ch. 588.

⁵³¹ Briggs v. Parsons, 39 Mich. 400.

⁵³² Parham v. Stith, 56 Miss. 465.

⁵³³ Bishop v. Rowe, 3 Maule & S. 362.

⁵³⁴ Heywood v. Pickering, L. R. 9 Q. B. 428; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367; Burkhalter v. Bank, 42 N. Y. 538; Kelty v. Bank, 52 Barb. (N. Y.) 328; Kobbi v. Underhill, 3 Sandf. Ch. (N. Y.) 277; Small v. Mining Co., 99 Mass. 277; McIntyre v. Kennedy, 29 Pa. St. 448; Kilpatrick v. Association, 119 Pa. St. 30, 12 Atl. 754; Larue v. Cloud, 22 Grat. (Va.) 513; Ocean Towboat Co. v. The Ophelia, 11 La. Ann. 28; Taylor v. Wilson, 11 Metc. (Mass.) 44. In this case, the check was returned for payment to the bank with a receipt for payment, and the bank failed before it was paid. As to laches in presenting a check for payment, see chapter 32, *supra*.

⁵³⁵ East River Bank v. Gedney, 4 E. D. Smith (N. Y.) 582; Marrett v. Brackett, 60 Me. 524; Watt v. Gans (Ala.) 21 South. 1011; at least *pro tanto*, Sweet v. Titus, 4 Hun (N. Y.) 639, 67 Barb. (N. Y.) 327.

ment, due to the check lying unopened on the holder's desk.⁵³⁶ But where a check is received late in the afternoon, and the bank stops payment early the next day, it will not be a payment, although the drawer had funds in the bank at the time it closed.⁵³⁷ So, delay will not discharge the drawer, if he had no funds in the bank.⁵³⁸ So, it will not be a payment, although the holder delays presentment for several weeks, and until the day after the bank has suspended, if the drawer had no funds in the bank either when the check was drawn or when the bank suspended.⁵³⁹

If the debtor gives in payment a certified check, which is used as money, he will still be liable on the debt after due presentment of the check, and notice of dishonor.⁵⁴⁰ And where a check is received in the evening, and accidentally destroyed by fire the next morning, the drawer will only be discharged by laches of the creditor, if he is thereby injured.⁵⁴¹ On the other hand, if the holder has failed to give the drawer notice of dishonor, it is incumbent on him to show that the drawer was not injured by his laches.⁵⁴²

Diligence against Indorsers.

§ 1563. Where a debtor indorses a bill or note to his creditor, he is entitled, like any other indorser, to due presentment and notice of dishonor, and the creditor must prove such presentment and notice.⁵⁴³ And this has been held to be so although the drawer of

⁵³⁶ *Brady v. Railway Co.*, 34 Barb. (N. Y.) 249.

⁵³⁷ *Cromwell v. Lovett*, 1 Hall (N. Y.) 56. So, if the check could not have been paid because the bank had already failed. *Gaar, Scott & Co. v. Hughes* (Tenn. Ch. App.) 35 S. W. 1092. And the drawer must prove that he has suffered damages. *Syracuse, B. & N. Y. R. Co. v. Collins*, 57 N. Y. 641, affirming 3 Lans. (N. Y.) 29; *Greenwich Ins. Co. v. Oregon Imp. Co.*, 76 Hun, 194, 27 N. Y. Supp. 794. But, to the effect that damages will be presumed from the holder's laches, see *Watt v. Gans*, 114 Ala. 264, 21 South. 1011.

⁵³⁸ *Hodgson v. Barrett*, 33 Ohio St. 63.

⁵³⁹ Especially if he afterwards promised payment to the payee, *Mordis v. Kennedy*, 23 Kan. 408.

⁵⁴⁰ *Rounds v. Smith*, 42 Ill. 245.

⁵⁴¹ *Scott v. Meeker*, 20 Hun (N. Y.) 161.

⁵⁴² *Stevens v. Park*, 73 Ill. 387; e. g. that the drawee was solvent, and that the drawer, when notified of his default, might have collected from him, *Whitcher v. Dexter*, 61 N. H. 91.

⁵⁴³ *Byles, Bills*, 390; 2 *Daniel, Neg. Inst.* 298; 1 *Edw. Bills & N.* § 263, (2236)

the bill had no fund in the drawee's hands.⁵⁴⁴ But want of diligence has been held to be immaterial where the debtor is not damaged by it; e. g. where the maker was insolvent at the time the note was given.⁵⁴⁵ And it has been held that a debtor who transfers in payment the note of a third person, with a separate instrument of guaranty, is entitled to due presentment and notice, although he did not indorse the note.⁵⁴⁶ The creditor's laches will discharge the indorser, although the paper was taken merely as collateral,⁵⁴⁷ and although the maker of the note indorsed was insolvent at the time.⁵⁴⁸ But if the note is refused as payment and received as collateral, and the maker is insolvent at its maturity, strict presentment and notice of dishonor will not be necessary, unless the indorser is injured by the omission.⁵⁴⁹ So, the debtor is entitled to due presentment and notice, whether he indorsed the bill or note in payment of an existing debt,⁵⁵⁰ or for property purchased at the time.⁵⁵¹ In such case the purchaser will only be liable as indorser, unless the note was made for his accommodation.⁵⁵² But even though the vendor receives the check, and gives his receipt for payment, it will not be a payment, if it is dishonored, unless it is made so by the vendor's laches.⁵⁵³

Kearlake v. Morgan, 5 Term R. 513; *Allen v. King*, 4 McLean, 128, Fed. Cas. No. 226; *Shipman v. Cook*, 16 N. J. Eq. 251; *Huston v. Weber*, 1 Hun (N. Y.) 120, 3 Thomp. & C. (N. Y.) 147; *Buckingham v. Payne*, 36 Barb. (N. Y.) 81; *Brooks v. Egan*, 6 Gill (Md.) 254; *Betterton v. Roope*, 3 Lea (Tenn.) 215; *Whitten v. Wright*, 34 Mich. 92.

⁵⁴⁴ *Denniston v. Imbrie*, 3 Wash. C. C. 396, Fed. Cas. No. 3,802. See § 1355, *supra*.

⁵⁴⁵ *Kephart v. Butcher*, 17 Iowa, 240; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130; *Westphal v. Ludlow*, 6 Fed. 348.

⁵⁴⁶ *Foote v. Brown*, 2 McLean, 369, Fed. Cas. No. 4,909.

⁵⁴⁷ *Byles, Bills*, 387; 2 *Daniel*, Neg. Inst. 300; *Peacock v. Pursell*, 32 Law J. C. P. 266; *Nicholson v. Gouthit*, 2 H. Bl. 609; or as collateral for an existing debt, *Lawrence v. McCalmont*, 2 How. 426; *Lee v. Baldwin*, 10 Ga. 208.

⁵⁴⁸ *Whitten v. Wright*, 34 Mich. 92.

⁵⁴⁹ *Westphal v. Ludlow*, 6 Fed. 348.

⁵⁵⁰ *Tobey v. Barber*, 5 Johns. (N. Y.) 68.

⁵⁵¹ *Hall v. Green*, 14 Ohio, 499.

⁵⁵² *Shriner v. Keller*, 25 Pa. St. 61.

⁵⁵³ And it is not laches to hold the check subject to the debtor's order after notice of dishonor. *Bradford v. Fox*, 38 N. Y. 289, 39 Barb. (N. Y.) 203.

Negligence after Loss—Delay in Suit.

§ 1564. But if the note received from an indorser is lost (by negligence of the creditor's agent), and no notice of the loss is given for four months, and the maker would have paid the note at maturity if presented, the debtor will be discharged.⁵⁵⁴

It is required in some states that the principal debtor shall be diligently prosecuted in order to hold the indorser or surety still liable. In such states, a purchaser who indorses a note to his vendor will be discharged by the indorsee's neglect to sue the maker until the statute of limitations had barred the note.⁵⁵⁵ But in general, although a note is received as conditional payment, the creditor is under no obligation to bring suit against the maker.⁵⁵⁶ So, if one takes notes by indorsement in trust for creditors of the indorser, and the notes are collected by the trustee and the proceeds misappropriated by his agent, he will not be liable to the debtor for his failure to take proceedings against the agent.⁵⁵⁷ And mere neglect on the creditor's part in collecting a collateral mortgage will not discharge the debtor who has indorsed a note with such collateral for his debt.⁵⁵⁸

Diligence on Transfer without Indorsement.

§ 1565. If the debtor transfers a bill or note without indorsement, he will not be discharged by want of formal presentment,⁵⁵⁹ or notice of dishonor.⁵⁶⁰ But, if the debtor's agent gives his check

⁵⁵⁴ Swett v. Southworth, 125 Mass. 417.

⁵⁵⁵ Thomason v. Cooper, 57 Ala. 560. As to diligence required in prosecuting the principal debtor, see §§ 761, 931, supra.

⁵⁵⁶ Dodge v. Stanton, 12 Mich. 408; Lamberton v. Windom, 12 Minn. 232 (Gil. 151).

⁵⁵⁷ Noland v. Clark, 10 B. Mon. (Ky.) 239.

⁵⁵⁸ Gilbert v. Marsh, 12 Hun (N. Y.) 519.

⁵⁵⁹ Byles, Bills, 390; Goodwin v. Coates, 1 Moody & R. 221. So, where the acceptance of a third party is taken without the debtor's indorsement. Swinyard v. Bowes, 5 Maule & S. 62. So, of a certificate of deposit received without guaranty or assignment, and good then but afterwards protested. Union Bank v. Smiser, 1 Sneed (Tenn.) 501.

⁵⁶⁰ Byles, Bills, 390; Bishop v. Rowe, 3 Maule & S. 362; Van Wart v. Smith, 1 Wend. (N. Y.) 219.

in payment, it has been held that, although the debtor was not a party to the instrument, he will be discharged from the debt, if the check is not presented within a reasonable time, and if the debtor is injured by the laches.⁵⁶¹

Effect of Receiving Check.

§ 1566. If the holder of a bill or note surrenders it to the drawee on receipt of his check, notwithstanding a usage to that effect, he will, in general, discharge the drawer and indorsers of the original bill.⁵⁶² unless it is presented and dishonored on the same day, and in time to give due notice of dishonor of the original bill.⁵⁶³ So, if he receives a new bill from the acceptor, and retains the original bill as security.⁵⁶⁴ So if, after surrendering the note on receipt of a check from the principal maker, the holder returns the check, and resumes the note as a favor to the maker, it will discharge a surety on the original note.⁵⁶⁵ And, if he extends the time of payment by receiving a check payable in future, he will discharge a surety.⁵⁶⁶ And even the acceptance of bank notes in payment of a bill of exchange will discharge the drawer and indorsers.⁵⁶⁷ If the creditor voluntarily surrenders his draft for the drawee's note pay-

⁵⁶¹ *Hopkins v. Ware*, L. R. 4 Exch. 268.

⁵⁶² *Byles, Bills*, 228; 2 *Daniel, Neg. Inst.* 640; *Story, Bills*, § 419; *Story, Prom. Notes*, § 389; *Powell v. Roach*, 6 *Esp.* 76; *Russell v. Hankey*, 6 *Term R.* 12; *Whitney v. Esson*, 99 *Mass.* 308. So, as to the original drawer, where the check was not presented until the next day, *Fernald v. Bush*, 131 *Mass.* 591; and was then dishonored, because the drawer of the check (the original debtor) had no funds in the bank, *Merchants' Nat. Bank v. Samuel*, 20 *Fed.* 664; or had then failed, *Smith v. Miller*, 43 *N. Y.* 171, reversing 6 *Rob. (N. Y.)* 157, 413; *Id.*, 52 *N. Y.* 545. So, as to the original indorser. *Strong v. King*, 35 *Ill.* 9.

⁵⁶³ *Ridley v. Blackett, Peake, Add. Cas.* 62. Especially where the order was taken and dishonored before the maturity of the original note, and the note was resumed and duly presented and protested at maturity. *Smith v. Harper*, 5 *Cal.* 329.

⁵⁶⁴ *Gould v. Robson*, 8 *East*, 576.

⁵⁶⁵ *Capital Sav. Bank v. Reel*, 62 *Cal.* 419.

⁵⁶⁶ *Bangs v. Mosher*, 23 *Barb. (N. Y.)* 478.

⁵⁶⁷ *Byles, Bills*, 228; *Chit. Bills*, 451; 2 *Edw. Bills & N.* § 751; *Vernon v. Boverie*, 2 *Show.* 296; *Guardians of Poor of Lichfield Union v. Greene*, 1 *Hurl. & N.* 884. And see § 749 et seq., supra.

able at a later time, it will discharge the draft.⁵⁶⁸ So, if he voluntarily takes a new bill when cash is offered;⁵⁶⁹ or a bank credit instead of the bill of exchange which his order on the bank calls for.⁵⁷⁰

But where a note is presented by mail without indorsement according to the usual custom, and is paid by a draft mailed by the bank to the collecting agent, and the draft is duly presented and dishonored, it will not be a payment of the note, if the maker had not sufficient funds at the bank where he made the note payable, although he afterwards settled with the bank.⁵⁷¹

Extension by Bill or Note.

§ 1567. The giving of a bill or note payable at a future day is an extension of the original debt,⁵⁷² although this is not true of a demand note.⁵⁷³ In like manner, a mortgage taken as collateral implies an extension until the mortgage is due.⁵⁷⁴ A bill is an extension until its maturity, whether given for the full amount of the original debt,⁵⁷⁵ or only for part of the amount.⁵⁷⁶ But a note given for part of the amount due on a bond has been held not to be an extension of the bond without an express agreement.⁵⁷⁷ Where a purchaser gives his acceptance for goods purchased, it will be an

⁵⁶⁸ Southwick v. Sax, 9 Wend. (N. Y.) 122.

⁵⁶⁹ Smith v. Ferrand, 7 Barn. & C. 19.

⁵⁷⁰ Bolton v. Richard, 6 Term R. 139, 1 Esp. 106.

⁵⁷¹ Indlg v. Bank, 80 N. Y. 100, reversing 16 Hun (N. Y.) 200.

⁵⁷² Byles, Bills, 391; Greene v. Bates, 74 N. Y. 333; Jagger Iron Co. v. Walker, 76 N. Y. 521; Douglas v. Bank, 97 Tenn. 133, 36 S. W. 874; Palmer v. Bramley [1896] 2 Q. B. 405; Lundberg v. Elevator Co., 42 Minn. 37, 43 N. W. 685; Reed v. Ashe, 18 App. Div. 501, 46 N. Y. Supp. 126; Shipman v. Kelley, 16 Misc. Rep. 673, 38 N. Y. Supp. 597; Martens-Turner Co. v. Mackintosh, 17 App. Div. 419, 45 N. Y. Supp. 275; Shipman v. Kelley, 9 App. Div. 316, 41 N. Y. Supp. 328; McMurray v. Taylor, 30 Mo. 263; Higgins v. Wortell, 18 Cal. 330; Smith v. Owens, 21 Cal. 11; Phoenix Ins. Co. v. Allen, 11 Mich. 501; inclusive of the days of grace, Appleton v. Parker, 15 Gray (Mass.) 173.

⁵⁷³ Peninsular Sav. Bank v. Hosie (Mich.) 70 N. W. 890.

⁵⁷⁴ Harshaw v. McKesson, 65 N. C. 688.

⁵⁷⁵ Kendrick v. Lomax, 2 Cromp. & J. 405, 2 Tyrw. 438.

⁵⁷⁶ Gould v. Robson, 8 East, 576.

⁵⁷⁷ Paine v. Voorhees, 26 Wis. 522.

extension until the maturity of the acceptance, although it is not negotiated by the seller.⁵⁷⁸

In like manner, if the creditor takes in payment the bill of a third party at the debtor's request, it will suspend his right of action until the bill matures.⁵⁷⁹ But the note or check of a third person taken as collateral merely is not an extension of the debt.⁵⁸⁰ So, one who accepts a bill for the accommodation of the drawer will not be discharged if the drawer gives his bond and warrant to confess judgment upon it, no extension of time being effected by that means.⁵⁸¹ So, the bond and warrant of the maker and first indorser of a note will not discharge the second indorser.⁵⁸²

Parties Discharged by Extension.

§ 1568. An extension of the debt effected by taking a bill or note payable in future will, in general, discharge an indorser⁵⁸³ or an accommodation indorser of the original instrument.⁵⁸⁴ In like manner, a postdated check will discharge an accommodation indorser.⁵⁸⁵ And if the creditor surrenders a draft for the acceptor's note, without the drawer's knowledge or consent, it will discharge him.⁵⁸⁶

The debtor's own note may amount to an extension of the debt, and discharge an original surety, although it is not payment, or

⁵⁷⁸ *Simon v. Lloyd*, 2 Crompt. M. & R. 187.

⁵⁷⁹ *Marsh v. Pedder*, 4 Camp. 257; *Taylor v. Briggs*, Moody & M. 28; *Robinson v. Reed*, 9 Barn. & C. 449, 4 Man. & R. 349. So, too, the note of a third party. *Smith v. Applegate*, 1 Daly (N. Y.) 91. And in California such note is an extension, although not a satisfaction. *Crary v. Bowers*, 20 Cal. 86. And action on the original debt revives in such case without notice of dishonor to the original debtor. *Swinyard v. Bowes*, 5 Maule & S. 62.

⁵⁸⁰ *Van Etten v. Troudden*, 1 Hun (N. Y.) 432.

⁵⁸¹ *Smith v. Knox*, 3 Esp. 46.

⁵⁸² *Slizer v. Heacock*, 23 Wend. (N. Y.) 81.

⁵⁸³ *Greene v. Bates*, 74 N. Y. 333; *Gould v. Robson*, 8 East, 576; *Green v. Skinner*, 72 Miss. 254, 16 South. 378. So, by a renewal without his indorsement, *Selman v. Brown*, 78 Ga. 332.

⁵⁸⁴ *Smith v. Becket*, 13 East, 187. And see § 120, supra. So, *Myers v. Welles*, 5 Hill (N. Y.) 463. In this case the holder knew the accommodation character of the indorser.

⁵⁸⁵ *Okie v. Spencer*, 2 Whart. (Pa.) 253.

⁵⁸⁶ *McLughan v. Bovard*, 4 Watts (Pa.) 308.

is only presumptive payment, as to the debtor.⁵⁸⁷ So, a joint maker, who is known to the holder to be a surety only, will be discharged if the holder, without his knowledge, takes a new note payable at a future day, although he continues to hold the original note by agreement as collateral.⁵⁸⁸ An original surety will be discharged if the holder takes a renewal without his consent,⁵⁸⁹ unless he takes it with the stipulation that his remedy on the original bond shall not be affected.⁵⁹⁰ If the holder of a guarantied note, in like manner, takes two new notes in renewal of it, he will thereby extend the debt, and discharge a guarantor.⁵⁹¹ But where one partner gives his note for a debt of the partnership, with an express agreement that the firm shall be liable if the note is not paid, the other partner (although in effect a surety) will not be discharged by such extension.⁵⁹²

Right of Action Suspended.

§ 1569. Where the creditor takes a bill or note payable at a future day, his right of action on the original debt will be suspended until the paper becomes due.⁵⁹³ So, if he takes a renewal of the original bill or note.⁵⁹⁴ But his action is only suspended where the bill is negotiable, and might, by its transfer, give right of action to another person.⁵⁹⁵

Where a purchaser of goods agrees to pay within three months by a bill at two months, it will amount to an extension of the right to

⁵⁸⁷ *Appleton v. Parker*, 15 Gray (Mass.) 173; *Lee v. Sewell*, 2 La. Ann. 940; *Mobile Life Ins. Co. v. Randall*, 71 Ala. 220; although the extension may only be for a day, *Fellows v. Prentiss*, 3 Denio (N. Y.) 512.

⁵⁸⁸ *Andrews v. Marrett*, 58 Me. 539.

⁵⁸⁹ *Morgan v. Their Creditors*, 1 La. 527; *First Nat. Bank of Springfield v. Leavitt*, 65 Mo. 562.

⁵⁹⁰ *Wyke v. Rogers*, 1 De Gex, M. & G. 408.

⁵⁹¹ *Hart v. Hudson*, 6 Duer (N. Y.) 294.

⁵⁹² *Vernam v. Harris*, 1 Hun (N. Y.) 451.

⁵⁹³ *Benj. Chalm. Dig.* art. 251; 2 *Daniel, Neg. Inst.* 295; 1 *Edw. Bills & N.* § 283; 2 *Pars. Notes & B.* 155; *Story, Bills*, § 419; *Happy v. Mosher*, 48 N. Y. 313; *Brewster v. Bours*, 8 Cal. 501; *Blunt v. Walker*, 11 Wis. 334; *Pitt v. Acosta*, 18 Fla. 270.

⁵⁹⁴ *Kendrick v. Lomax*, 2 *Crompt. & J.* 405, 2 *Tyrw.* 438; *In re London, B. & S. Staffordshire Bank*, 34 *Law J. Ch.* 418.

⁵⁹⁵ *Webster v. Bainbridge*, 13 *Hun (N. Y.)* 180.

due for the price of the goods during the five months; but an action might lie in the meantime for not giving the bill as agreed.⁵⁹⁶ It has been held, however, that the giving of a note in payment for goods is not of itself an extension, but the extension is a question of fact for the jury; and it will suspend the creditor's right of action only if it exists.⁵⁹⁷ Thus, if a note is received from a building contractor, and not in satisfaction of the amount due, it will not be an extension *prima facie*, either to discharge a surety or suspend the right of action against the owner on a mechanic's lien; but the agreement for the extension must be proved.⁵⁹⁸

Other Rights Suspended.

§ 1570. The right to commence suit by attachment, like any other right of action, will be suspended if the creditor takes the debtor's negotiable note, and procures it to be discounted.⁵⁹⁹ But if a debt is secured by a bill of sale, with a right to take possession of the goods, a note given in payment will not affect the bill of sale or the right of possession, although it may suspend the creditor's right to dispose of the goods.⁶⁰⁰ And the right to file a mechanic's lien and bring a suit upon it will, in general, be suspended by taking a bill or note payable in future.⁶⁰¹ But, if a note is given for goods purchased, the title to the goods will pass to the purchaser, and the time for payment be extended, the goods being subject (as in other cases of sale) to the vendor's right of lien and of stoppage in transitu.⁶⁰²

Payment by a bill or note also suspends the creditor's right to distrain;⁶⁰³ and, in general, it suspends the running of the statute

⁵⁹⁶ *Mussen v. Price*, 4 East, 147.

⁵⁹⁷ *Moore v. Filtz*, 59 N. H. 572.

⁵⁹⁸ *Shaw v. Presbyterian Church*, 39 Pa. St. 226.

⁵⁹⁹ *McCluny v. Jackson*, 6 Grat. (Va.) 96; and especially where the paper has been transferred, *Black v. Zacharie*, 3 How. 483.

⁶⁰⁰ *Bramwell v. Eglinton*, 5 Best & S. 39.

⁶⁰¹ *Dey v. Anderson*, 39 N. J. Law, 199; *Cox v. Keiser*, 15 Ill. App. 432; *Pitt v. Acosta*, 18 Fla. 270.

⁶⁰² *Hall v. Richardson*, 16 Md. 396.

⁶⁰³ *Byles, Bills*, 388; *Ewer v. Clifton*, Bull. N. P. 182; *Palfrey v. Baker*, 3 Price, 572; *Davis v. Gyde*, 2 Adol. & E. 623, 4 Nev. & M. 462; *Hornbrooks v. Lucas*, 24 W. Va. 498.

of limitations on the original debt.⁶⁰⁴ But where a renewal note is given by a corporation for a debt, on which an action lies against the original stockholders, the statute will run against the stockholders from the time the original action accrued.⁶⁰⁵ The effect of extending the right of action until the maturity of the bill or note taken in payment is in other respects without prejudice to the creditor's rights, and his action on the original consideration will revive after the paper has matured.⁶⁰⁶ And if goods are sold on an agreement that the purchaser shall give his note payable in one year, and "to be approved by the vendor," an agreement for a surety will be implied, and the vendor may have his action at once for the price of the goods, if the note is not given when requested.⁶⁰⁷ So, if a debt is paid by an order on a third person, payable out of a particular fund to be created, it will not be presumed to be a payment, and will not suspend the creditor's right to sue on the debt.⁶⁰⁸ But if a stranger takes up another's note with an indorser by giving his own note, with the agreement that the original note shall remain in the holder's hands until the new note is paid, an agreement to extend the original note will be implied, and the indorser on it will be discharged.⁶⁰⁹

Collateral Security—Effect of Renewal.

§ 1571. Where a bill or note secured by collateral is renewed, the collateral will continue as security for the renewal.⁶¹⁰ And this is true of a collateral mortgage given to secure the original

⁶⁰⁴ Byles, Bills, 388; *Sayer v. Wagstaff*, 5 Beav. 415; *In re Harries*, 13 Mees. & W. 3.

⁶⁰⁵ *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Parrott v. Colby*, 71 N. Y. 597.

⁶⁰⁶ Byles, Bills, 391; *Ex parte Barclay*, 7 Ves. 597; *Bishop v. Rowe*, 3 Maule & S. 362; *Dillon v. Rimmer*, 1 Bing. 100, 7 Moore, 427.

⁶⁰⁷ *Hale v. Jones*, 48 Vt. 227.

⁶⁰⁸ *Brill v. Holle*, 53 Wis. 537, 11 N. W. 42. But if a note is given payable out of the proceeds of certain sales, no action will lie on the original consideration without proof that there was no such fund or that the maker had not performed his agreement. *Israel v. Redding*, 40 Ill. 362.

⁶⁰⁹ *Greene v. Bates*, 74 N. Y. 333.

⁶¹⁰ *Flanagin v. Hambleton*, 54 Md. 222; *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 Ohio St. 208; *Ohio Life Ins. & Trust Co. v. Winn*, 4 Md. Ch. 253; *Holland Trust Co. v. Waddell*, 75 Hun, 104, 26 N. Y. Supp. 980; *Appeal of Kim-*

note;⁶¹¹ and it will not be discharged if the renewal is taken up and paid by the mortgagee.⁶¹² So, if the renewal includes accrued interest,⁶¹³ or if the interest is indorsed on the original note, and a separate note given for it.⁶¹⁴ A note for the interest will not discharge the lien of the mortgage without an agreement to that effect.⁶¹⁵

In like manner, if the renewal of a note is made to a different payee, the original mortgage will still be available as collateral.⁶¹⁶ So, if accommodation acceptances of A. are given as collateral for other acceptances by B., and the latter are paid by the proceeds of renewals by B., the collateral (being left in the holder's hands without presentment for payment) will cover the renewals.⁶¹⁷

On the other hand, the guaranty of notes to a certain amount by A., to be indorsed by B., has been held not to cover a subsequent renewal by A. and C., indorsed by B.⁶¹⁸ So, if a note is made payable at a bank, and secured by a trust deed, and a second note and trust deed are given by the maker to discharge the first, and the first is paid by the bank to the holder, upon his indorsement without recourse, it will be a payment, and not a renewal of the original note, and will discharge the first trust deed.⁶¹⁹ And in Pennsylvania a mortgage given to secure a note will not cover the renewal

berly (Pa. Sup.) 7 Atl. 75; *McNamara v. Condon*, 2 MacArthur (D. C.) 364; *Collins v. Dawley*, 4 Colo. 138; *Vick v. Smith*, 83 N. C. 80.

⁶¹¹ *Watkins v. Hill*, 8 Pick. (Mass.) 522; *Pomroy v. Rice*, 16 Pick. (Mass.) 22; *Taber v. Hamlin*, 97 Mass. 489; *Kidder v. McIlhenny*, 81 N. C. 123; *Bodkin v. Merit*, 86 Ind. 560; *Walters v. Walters*, 73 Ind. 425; especially where this is expressly stipulated, *McNamara v. Condon*, 2 MacArthur (D. C.) 364. So, where a renewal with a forged signature had been used to take up the original. *Egan v. Fuller*, 35 Minn. 515, 29 N. W. 313.

⁶¹² *Boxheimer v. Gunn*, 24 Mich. 372.

⁶¹³ *Elliott v. Sleeper*, 2 N. H. 525; or interest in advance, *Union Nat. Bank v. Stocomb*, 34 La. Ann. 927. But see, contra, where the renewal includes other new matter, *Ladner v. Balsley*, 108 Iowa, 674, 72 N. W. 787.

⁶¹⁴ *Sears v. Wempner*, 27 Minn. 351, 7 N. W. 362.

⁶¹⁵ *Hutchinson v. Swartsweller*, 31 N. J. Eq. 206.

⁶¹⁶ *Burdett v. Clay*, 8 B. Mon. (Ky.) 287; *McCormick v. Digby*, 8 Blackf. (Ind.) 99.

⁶¹⁷ *Woodroffe v. Hayne*, 1 Car. & P. 600.

⁶¹⁸ *Russell v. Perkins*, 1 Mason, 368, Fed. Cas. No. 12,160.

⁶¹⁹ *Christian v. Newberry*, 61 Mo. 446. And see, as to successive pledges of the same property, *Fairbank v. Bank*, 132 Ill. 120, 22 N. E. 524.

of it.⁶²⁰ If a bond is deposited by A. as collateral for his note, and the note is taken up by a stranger, B., without A.'s knowledge, and B.'s note given in renewal, and the collateral is left by B. with the holder, and afterwards sold on maturity of the renewal, without notice to A., it cannot be applied to the renewal, and A. may have trover against the holder for the bond.⁶²¹

Vendors' Lien—Stoppage in Transitu.

§ 1572. A note is presumed not to be an absolute payment if a lien securing the original debt would be lost thereby.⁶²² Thus, a vendor's lien for goods sold will not be discharged by the purchaser's acceptance,⁶²³ or by his note or renewal.⁶²⁴ In Indiana, however, it will be discharged by such note, in the absence of an agreement to the contrary.⁶²⁵ If the purchaser gives his bill in payment for goods, and the goods remain in the vendor's hands, the right to enforce his lien will revive on the dishonor of the bill.⁶²⁶ And if goods are sold by A. to B., and resold by B. to C. (who was a clerk of A., but known by him to be doing business for himself), and C. pays B. by his acceptance, and during the running of the bill marks the goods in A.'s store, but does not receive them into his possession, B.'s lien for the price will not be extinguished by the acceptance.⁶²⁷

In like manner, if a note is given for goods purchased, and the goods are shipped, but retained in the custom house until the note

⁶²⁰ *Ayres v. Wattson*, 57 Pa. St. 360; *Moorehead v. Duncan*, 82 Pa. St. 488. But see, contra, as to a collateral judgment, *Laucks v. Michael*, 154 Pa. St. 355, 26 Atl. 314.

⁶²¹ *Burnap v. Bank*, 96 N. Y. 125.

⁶²² *Sweet v. James*, 2 R. I. 270.

⁶²³ *Felse v. Wray*, 3 East, 93.

⁶²⁴ *Walker v. Struve*, 70 Ala. 167; *Hess v. Dille*, 23 W. Va. 90; *McElwee v. McElwee*, 97 Tenn. 649, 37 S. W. 560; *Roberts v. Bruce*, 91 Ky. 379, 15 S. W. 872.

⁶²⁵ *Schnelder v. Kolthoff*, 59 Ind. 568.

⁶²⁶ *Byles, Bills*, 392; 2 Daniel, Neg. Inst. 302; 2 Pars. Notes & B. 165; *New v. Swain*, 1 Dans. & L. 193; *Valpy v. Oakeley*, 16 Q. B. 941. The lien is not lost while the goods remain in his possession. *Milliken v. Warren*, 57 Me. 46. And, if a demand note is given for property purchased, an intention to discharge the lien will not be presumed. *Clark v. Draper*, 19 N. H. 419.

⁶²⁷ *Dixon v. Yates*, 5 Barn. & Adol. 341.

is dishonored, the vendor will still have a right of stoppage in transitu.⁶²⁸ So, if consignments are made to one another by A. and B., and B. draws his bill on A. for the difference in value between the consignments, he may still stop the goods, if the bill is protested, although he had received a part payment, and a bill for the balance drawn by A. on his vendee, C.⁶²⁹ But if goods are sold to A. upon B.'s order, stipulating for payment in other goods, they cannot be stopped in transitu on B.'s failure.⁶³⁰

Vendor's Lien on Land.

§ 1573. If a bill is given for the purchase of land, it will, in like manner, leave the vendor's lien undisturbed.⁶³¹ And such lien will remain good against a purchaser with notice,⁶³² and will not be discharged by a renewal of the bill.⁶³³ So, if a note is given in part for land purchased, it will be secured pro tanto by the vendor's lien.⁶³⁴ And if land is sold to A. and B., and their several notes taken for it, the vendor's lien will not be discharged.⁶³⁵ And such

⁶²⁸ Donath v. Broomhead, 7 Pa. St. 301.

⁶²⁹ Newhall v. Vargas, 13 Me. 93.

⁶³⁰ Eaton v. Cook, 32 Vt. 58.

⁶³¹ Byles, Bills, 391; 2 Daniel, Neg. Inst. 303; 2 Pars. Notes & B. 166; Ex parte Loaring, 2 Rose, 79; Grant v. Mills, 2 Ves. & B. 306; Garson v. Green, 1 Johns. Ch. (N. Y.) 308; Whetsel v. Roberts, 31 Ohio St. 503; Marsh v. Turner, 4 Mo. 253; Knisely v. Williams, 3 Grat. (Va.) 285; Lagow v. Badollet, 1 Blackf. (Ind.) 416; Martin v. Cauble, 72 Ind. 67; Ross v. Whitson, 6 Yerg. (Tenn.) 50; Sheratz v. Nichodemus, 7 Yerg. (Tenn.) 9; Kennedy v. Woolfolk, 3 Hayw. (Tenn.) 195; unless it is otherwise secured, Hunt v. Marsh, 80 Mo. 396. But a note with a married woman as surety, which was not binding upon her by the law when it was made, is not sufficient to discharge the lien. Felton v. Smith, 84 Ind. 485. If a note for real property expressly reserves the vendor's lien, it is not discharged, of course, Hall v. Railroad Co., 58 Ala. 10; and may be foreclosed in the decree, although not mentioned in the verdict, Slade v. Young, 32 Tex. 668.

⁶³² Wynne v. Alston, 16 N. C. 163.

⁶³³ Woodward v. Echols, 58 Ala. 665; Allet v. Woods, 24 La. Ann. 193. So, as against a wife's homestead claim, where the deed was to the wife, and the note and renewal were by husband and wife. Haynie v. Watson, 70 Ga. 707.

⁶³⁴ Swain v. Cato, 34 Tex. 395.

⁶³⁵ Hoggatt v. Wade, 10 Smedes & M. (Miss.) 143.

lien is not discharged by the purchaser's bond,⁶³⁶ and will be available after his death as against his creditors.⁶³⁷

In like manner, the vendor's lien will not be discharged by a check which is void;⁶³⁸ or by a bill which is not sufficiently stamped;⁶³⁹ or by a note, neither negotiable nor collectible, given under an agreement for a good and negotiable note of another person;⁶⁴⁰ or by a note payable "in Mississippi certificates of indebtedness."⁶⁴¹ And the vendor's lien will remain, although notes taken for the purchase money are barred by the statute of limitations.⁶⁴²

Vendor's Lien—Note by or to Third Person.

§ 1574. In like manner, a vendor's lien is not discharged by taking a note from the purchaser payable to a third person.⁶⁴³ Thus, A. may have a vendor's lien for a note payable to him, but delivered to the original vendor, E., and reciting that it was given for "balance due on land purchased of E."⁶⁴⁴

And it has been held that the vendor's lien will not be discharged

⁶³⁶ *Cox v. Fenwick*, 3 Bibb (Ky.) 183; *Yancey v. Mauck*, 15 Grat. (Va.) 300; although it is made payable 12 months after the death of the vendor, *Winter v. Anson*, 1 Sim. & S. 434, 3 Russ. 488. And if a bond secured by a vendor's lien is afterwards merged with other debts in a larger bond, and the latter is reduced by part payments, and finally surrendered on a confession of judgment, expressly reserving the original lien, it will be applied pro rata to all of the debts secured by the second bond. *Coles v. Withers*, 33 Grat. (Va.) 192.

⁶³⁷ *White v. Casanave*, 1 Har. & J. (Md.) 106.

⁶³⁸ *Bond v. Warden*, 1 Colly. 583. On the other hand, a trustee who conveys to his cestui que trust retains no lien for his services and advances, although he took a worthless check from the grantee for them. *O'Connor v. Smith*, 40 Ohio St. 214.

⁶³⁹ *Bytes, Bills*, 392; *Cundy v. Marriott*, 1 Barn. & Adol. 696.

⁶⁴⁰ *Gee v. McMillan*, 14 Or. 268, 12 Pac. 417.

⁶⁴¹ *Deason v. Taylor*, 53 Miss. 697.

⁶⁴² *Baker v. Ramey*, 27 Tex. 52.

⁶⁴³ *Wynn v. Flannegan*, 25 Tex. 778. But see, contra, *Rutland v. Brister*, 53 Miss. 683. Especially if the note was good when delivered, but the maker became insolvent before the end of the suit. *Mims v. Railroad Co.*, 3 Kelly (Ga.) 333.

⁶⁴⁴ *Pinchain v. Collard*, 13 Tex. 333.

by taking a third person's note⁶⁴⁵ or acceptance,⁶⁴⁶ or his note indorsed by the purchaser, and secured by a mortgage on the land.⁶⁴⁷ So, if he takes the note of a third party for an original purchaser's note secured by such lien.⁶⁴⁸ And where the vendor takes the note of a third party with the purchaser's indorsement, and transfers it, it has been held to be still secured by the lien.⁶⁴⁹ So, if the original vendor takes the note of a subpurchaser, and releases his vendor's lien, it has been held in Texas that the land will still be liable for the amount represented by the purchase money of the later sale.⁶⁵⁰

Vendor's Lien Affected by Other Security.

§ 1575. If the purchaser's bill or note is taken with a good indorser, it will, in general, discharge the vendor's lien,⁶⁵¹ unless such presumption is rebutted by withholding the deed.⁶⁵² And even if the note is mentioned in the deed, with a recital that the purchase money is unpaid, it will not amount to notice of an intention to retain the lien, although evidence may be admitted to prove such intention.⁶⁵³ And where land is paid for by a note of one partner, A., indorsed by the other partner, B., the lien will remain and inure to the benefit of A. as against the interest of B., upon A.'s paying more than his share of the purchase money.⁶⁵⁴ So, a vendor's lien is, in general, discharged by taking a note for the price with a

⁶⁴⁵ *Honore v. Bakewell*, 6 B. Mon. (Ky.) 67; *Kausler v. Ford*, 47 Miss. 289; *Lord v. Wilcox*, 99 Ind. 491; *Roper v. Day*, 48 Ala. 509. But see, contra, *Sears v. Smith*, 2 Mich. 243. Notwithstanding fraudulent representations as to the note, *Himes v. Langley*, 85 Ind. 77; although the note of the original purchaser was surrendered, and the note of a subsequent purchaser taken, *Dennis v. Williams*, 40 Ala. 633; *Muir v. Cross*, 10 B. Mon. (Ky.) 277.

⁶⁴⁶ Even against a bona fide purchaser of the land, *Murray v. Gouverneur*, 2 Johns. Cas. (N. Y.) 438.

⁶⁴⁷ *Lane v. Collier*, 46 Ga. 580.

⁶⁴⁸ *Ellis v. Singletary*, 45 Tex. 27.

⁶⁴⁹ *Knight v. McReynolds*, 37 Tex. 204.

⁶⁵⁰ *Perry v. Woodson*, 61 Tex. 228; *Rawles v. Perkey*, 50 Tex. 311.

⁶⁵¹ *Brown v. Gilman*, 4 Wheat. 256; *Foster v. Trustees*, 3 Ala. 302.

⁶⁵² *Magruder v. Peter*, 11 Gill & J. (Md.) 217.

⁶⁵³ *Campbell v. Baldwin*, 2 Humph. (Tenn.) 248.

⁶⁵⁴ *Tompkins v. Mitchell*, 2 Rand. (Va.) 428.

surety;⁶⁵⁵ but this presumption may be rebutted.⁶⁵⁶ And, if the vendor takes a mortgage on part of the land for part of the purchase money, it will be a discharge of his general lien.⁶⁵⁷ So, there will be no lien where he takes a note for the price, and the land is afterwards conveyed by the purchaser in trust for his creditors;⁶⁵⁸ or if the vendor takes the purchaser's note and trust deed payable to another.⁶⁵⁹

Vendor's Lien Affected by Transfer of Note.

§ 1576. Where the vendor takes a note, and retains the security of the vendor's lien, it will generally pass with a transfer of the note.⁶⁶⁰ And, if he procures the note to be discounted by his banker, it will not discharge the lien.⁶⁶¹ So, the lien will revive in him or his executor upon his taking up or repurchasing the note.⁶⁶² But, if a note is given for goods sold, a statutory exemption from execution, which will not apply to the goods sold as against the seller, will apply as against an indorsee of the note.⁶⁶³ If a lien is discharged by the giving of a note, it will not revive on the transfer of the note to a bona fide holder.⁶⁶⁴ And if a note given for land purchased is paid out of the proceeds of a discount of a draft, given in renewal by the maker, and not paid, the indorsee who took up

⁶⁵⁵ *Boon v. Murphy*, 6 Blackf. (Ind.) 272. And in such case the indorsee of the note gets no lien. *Walker v. Carroll*, 65 Ala. 61.

⁶⁵⁶ *Willis v. Gay*, 48 Tex. 463.

⁶⁵⁷ *Capper v. Spottiswoode*, Tam. 21.

⁶⁵⁸ *Womble v. Battle*, 38 N. C. 182.

⁶⁵⁹ It being in such case a question for the jury whether the vendor's lien was waived or merged in the trust deed. *Irvin v. Garner*, 50 Tex. 48.

⁶⁶⁰ *Stevens v. Chadwick*, 10 Kan. 406; *Kenny v. Collins*, 4 Litt. (Ky.) 289; *Edwards v. Bohannon*, 2 Dana (Ky.) 98; although the vendor may not be liable on the note, *Wolfe v. Nall*, 62 Ala. 24; and although the note was merged in a judgment before its transfer, and the land was in the possession of a bona fide purchaser, *Johnston v. Gwathmey*, 4 Litt. (Ky.) 317.

⁶⁶¹ *Gunn v. Bolckow*, 10 Ch. App. 491, overruling *Bunney v. Poyntz*, 4 Barn. & Adol. 568, 1 Nev. & M. 229. So, *Sweet v. James*, 2 R. I. 270.

⁶⁶² *Cotten v. McGehee*, 54 Miss. 510. And this is also true of a note for rent secured by a landlord's lien. *Farwell v. Grier*, 38 Iowa, 83.

⁶⁶³ *Shepard v. Cross*, 33 Mich. 96.

⁶⁶⁴ *Donegan's Adm'r v. Hentz*, 70 Ala. 437.

the note will not be protected by the vendor's lien.⁶⁶⁵ And in many states the lien of the vendor is discharged if he makes a transfer of the purchaser's note;⁶⁶⁶ especially where the deed recites the payment of consideration money.⁶⁶⁷ And if land is sold by a married woman without express reservation of a lien, and a note is taken for it payable to her, and her husband transfers the note with a guaranty for a debt of his, no lien will pass to the indorsee, although such lien was guarantied in the transfer.⁶⁶⁸ So, where the purchaser's note is transferred by the vendor with the maker's guaranty, any lien that might exist will be waived by the additional security taken by the indorsee.⁶⁶⁹

Effect on Mechanic's Lien.

§ 1577. Taking a negotiable bill or note for a debt secured by a mechanic's lien will not discharge the lien, unless it is clearly so intended,⁶⁷⁰ even though the debt is receipted in full.⁶⁷¹ It is a

⁶⁶⁵ *Shall v. Blasco*, 18 Ark. 142.

⁶⁶⁶ *Iglehart v. Armiger*, 1 Bland (Md.) 519; *Jackman v. Hallock*, 1 Ohio, 318. So, if transferred without recourse. *Schnebly v. Ragan*, 7 Gill & J. (Md.) 120; *Hightower v. Rigsby*, 56 Ala. 126.

⁶⁶⁷ *Rogers v. James*, 33 Ark. 77.

⁶⁶⁸ *Pillow v. Helm*, 7 Baxt. (Tenn.) 545.

⁶⁶⁹ *Woods v. Balley*, 3 Fla. 41.

⁶⁷⁰ 2 Daniel, Neg. Inst. 305; 2 Pars. Notes & B. 176; *Blake v. Pitcher*, 46 Md. 453; Code Md. art. 61, § 11; *Brady v. Anderson*, 24 Ill. 110; *Calef v. Brinley*, 58 N. H. 90; *Lane v. Jones*, 79 Ala. 156; *Livesey v. Hamilton*, 47 Neb. 644, 66 N. W. 644; *Donovan v. Frazier*, 15 App. Div. 521, 44 N. Y. Supp. 533; *McMurray v. Taylor*, 30 Mo. 263; *Mix v. Ely*, 2 G. Greene (Iowa) 513; *Greene v. Ely*, Id. 508; *Logan v. Attix*, 7 Iowa, 77; *Kinsley v. Buchanan*, 5 Watts (Pa.) 118; *Hinchman v. Lybrand*, 14 Serg. & R. (Pa.) 32. If it matures before the lien expires, *Wisconsin Trust Co. v. Robinson*, 15 C. C. A. 668, 68 Fed. 778; *Hersh v. Carman*, 51 Neb. 784, 71 N. W. 713; or a workman's preference for wages against an insolvent corporation, *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. 192. But see, contra, when the note is payable in future, *Silver v. Williams*, 17 Serg. & R. 292; *Ohio Falls Car Mfg. Co. v. Central Trust Co.*, 18 C. C. A. 386, 71 Fed. 916; *People v. Remington*, 45 Hun, 335; *Spencer v. Hodgman*, 37 Hun, 490, 11 N. Y. Supp. 241. So, drafts on a third party accepted and paid by him do not carry the laborers' liens which were paid with them. *Beecher v. Dacey*, 45 Mich. 92, 7 N. W. 689.

⁶⁷¹ *Wheeler v. Schroeder*, 4 R. L. 383; *The Charlotte v. Hammond*, 9 Mo. 58;

question for the jury in such case whether a discharge is intended.⁶⁷² So, where the payment is credited upon the books of the creditor, as well as receipted in full, and a subsequent purchaser becomes interested in the property, the discharge of the lien is a question for the jury.⁶⁷³ An agreement, express or implied, is necessary to effect such discharge; and such agreement will not be presumed by reason of the note being made payable one day after date, or the lien being filed on the day the note bears date.⁶⁷⁴ And the subsequent transfer of the note will not make it a payment.⁶⁷⁵

But if the note is made payable after the expiration of the time for filing the lien, and is transferred by the payee, it will be sufficient without other evidence of intention to discharge the lien,⁶⁷⁶ although the parties had agreed that the note should not be a satisfaction of the debt.⁶⁷⁷ So, if a mechanic takes a certificate for wages preferred by statute, and assigns the certificate to another, who surrenders it for a negotiable note, it will be deemed a waiver of his statutory preference.⁶⁷⁸

§ 1578. — On the other hand, a mechanic's lien will not be discharged by a draft on the owner or by his acceptance of such draft;⁶⁷⁹ or by notes made direct to the creditor, or at his request to a third person, and afterwards transferred to him.⁶⁸⁰ But a partnership note, taken in satisfaction of the building debt of one partner, amounts to a new security, and will be a discharge of the builder's lien.⁶⁸¹ So, where the lien creditor takes by indorsement from

Howard v. Jones, 33 Mo. 583; Goble v. Gale, 7 Blackf. (Ind.) 218. And the lien may be filed after the note matures.

⁶⁷² Jones v. Shawhan, 4 Watts & S. (Pa.) 261; Oasey v. Weaver, 141 Mass. 280, 6 N. E. 372.

⁶⁷³ Seltzer v. Coleman, 32 Pa. St. 493.

⁶⁷⁴ Teal v. Spangler, 72 Ind. 380.

⁶⁷⁵ German Bank v. Schloth, 59 Iowa, 316, 13 N. W. 314.

⁶⁷⁶ Green v. Fox, 7 Allen (Mass.) 85.

⁶⁷⁷ Morton v. Austin, 12 Cush. (Mass.) 389. But see, contra, if so taken under the terms of the building contract and lien expressly reserved by it, Butler-Ryan Co. v. Silvey (Minn.) 73 N. W. 406.

⁶⁷⁸ Montgomery's Appeal (Pa. Sup.) 7 Atl. 231, 9 Eastern Rep. 402.

⁶⁷⁹ Jones v. Hurst, 67 Mo. 568.

⁶⁸⁰ Bashor v. Nordyke, 25 Kan. 222.

⁶⁸¹ Benneson v. Thayer, 23 Ill. 374.

his debtor a note which was made for value by another party,⁶⁸² or where he takes the debtor's note and mortgage.⁶⁸³ So, where the lien claim is against a firm, and the creditor takes the note of one partner, with a mortgage on the property which is subject to the lien.⁶⁸⁴ This subject has been regulated by statute in Maine, where it was held, prior to the act of 1851, that the debtor's note discharged the mechanic's lien claim.⁶⁸⁵ But the note of a third person, indorsed by the debtor, with the express agreement that it should not be a payment unless paid, will not discharge a lien, notwithstanding an unperformed agreement between the creditor and the maker of the note to take a less sum than its face in satisfaction.⁶⁸⁶

Effect on Maritime Liens.

§ 1579. The same rule applies, in general, to a maritime lien for which a note is taken. The lien will not be discharged by the note, unless it was so intended.⁶⁸⁷ So, a draft is only conditional payment of a ship's debt contracted in a foreign port, and will not discharge the creditor's lien.⁶⁸⁸ Liens which are dependent upon possession of the property, such as an owner's lien for freight, are held to be discharged, where a bill or note is taken in payment.⁶⁸⁹ So, a seaman's lien for wages will be discharged, in England, if he takes a bill on the owner.⁶⁹⁰ So, a lien for pilot's wages will be discharged by the owner's note at a higher rate of interest, if it is not prosecuted for several months, and other claims intervene without notice.⁶⁹¹ In the United States, however, it has been held that

⁶⁸² *Ferdon v. Jones*, 2 E. D. Smith (N. Y.) 106.

⁶⁸³ *Trullinger v. Kofoed*, 7 Or. 228, although he filed his lien on the same day.

⁶⁸⁴ *Dutton v. Insurance Co.*, 29 N. H. 153.

⁶⁸⁵ *Coburn v. Kerswell*, 35 Me. 126. The act of 1851 required an express agreement on taking the note to discharge the lien.

⁶⁸⁶ *Prentiss v. Garland*, 67 Me. 345.

⁶⁸⁷ *Moore v. Newbury*, 1 Newb. Adm. 49, Fed. Cas. No. 9,772; *The Queen of St. Johns*, 31 Fed. 24.

⁶⁸⁸ *The Emily Souder*, 17 Wall. 606; *Mehan v. Thompson*, 71 Me. 492.

⁶⁸⁹ 2 Para. Notes & B. 167; although a personal note is given, *Id.* 170.

⁶⁹⁰ *William v. Money*, 2 Hagg. Adm. 136.

⁶⁹¹ *Risher v. The Frolic*, 1 Woods, 92, Fed. Cas. No. 11,856.

seamen's wages are not discharged by an order on the owner,⁶⁹² or by a note.⁶⁹³

§ 1580. — In like manner, a lien for ship's supplies is not discharged by a note of the ship's agent,⁶⁹⁴ or of the owner.⁶⁹⁵ But if a bill is taken, and the creditor delays to collect the bill or enforce the lien while the owners are in good credit, his lien will be discharged.⁶⁹⁶ A lien for repairs of a vessel has been held not to be a maritime contract, but to be governed by local law, and, as such, not to be discharged by a note taken from the master.⁶⁹⁷ On the other hand, a bill drawn by the master, expressly in consideration of advances for repairs, has been held to discharge the lien.⁶⁹⁸ A note given for the charter money of a vessel will not, in general, discharge the lien on the cargo.⁶⁹⁹ But where a contract is made for the payment of dockage rates in quarter-yearly payments, and the creditor accepts an order on the ship's agent for the payment, it will discharge the lien.⁷⁰⁰ And where the contract is for payment of freight by delivery of "good and approved bills," the receiving of bills will be construed to be an approval, and will discharge the lien.⁷⁰¹

Effect on Original Action.

§ 1581. Where the note of a debtor is taken, and is not paid at maturity, the creditor's right to bring suit upon the original consideration revives.⁷⁰² So, a fortiori, on nonperformance of an agree-

⁶⁹² *The Eastern Star*, 1 Ware, 184, Fed. Cas. No. 4,254.

⁶⁹³ *Butts v. Cuthbertson*, 6 Ga. 166; although the state law made the note a payment, *The Betsy and Rhoda*, 2 Ware, 113, Fed. Cas. No. 1,366.

⁶⁹⁴ *The Active*, Olc. 286, Fed. Cas. No. 34.

⁶⁹⁵ *Page v. Hubbard*, Spr. 335, Fed. Cas. No. 10,663.

⁶⁹⁶ *Leland v. The Medora*, 2 Woodb. & M. 92, Fed. Cas. No. 8,237. So, if the vessel against which the lien would go is itself sold on execution to satisfy the note. *The Mary Morgan*, 28 Fed. 196.

⁶⁹⁷ *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717.

⁶⁹⁸ *Murray v. Lazarus*, 1 Paine, 572, Fed. Cas. No. 9,962.

⁶⁹⁹ *The Kimball*, 3 Wall. 37.

⁷⁰⁰ *Ex parte Lewis*, 2 Gall. 483, Fed. Cas. No. 8,310.

⁷⁰¹ *Byles*, Bills, 391; *Horncastle v. Farran*, 3 Barn. & Ald. 497, 2 Starkie, 590; *Alsager v. Dock Co.*, 14 Mees. & W. 794.

⁷⁰² *Porter v. Talcott*, 1 Cow. (N. Y.) 359; *Fry v. Patterson*, 49 N. J. Law, 612, 10 Atl. 390; *Stewart v. Manufacturing Co.*, 95 Tenn. 497, 32 S. W. 464; (2254)

ment to give and receive such note.⁷⁰³ And if an agent, on making a sale of goods, takes a note without authority, and transfers it to his principal, the principal may still sue the purchaser for the price of the goods.⁷⁰⁴ A creditor cannot, however, take several notes for one book account, and on their maturity, at different times, recover part of his debt on one note, and afterwards sue upon the original consideration (instead of the other notes) for the balance of the debt.⁷⁰⁵

But merely taking a renewal will not bar a recovery on the original consideration.⁷⁰⁶ And it has been held that a creditor may take a renewal note for the principal of a debt, leaving the interest remaining open, and retaining the original note, and may still have his action for the interest due him.⁷⁰⁷ But where a renewal is secured by a bond and warrant to confess judgment, and the amount is subsequently paid, except the costs of the judgment, the creditor cannot sue upon the original bill for such unpaid costs.⁷⁰⁸

If a bill is taken for a note, and no demand of payment is made on the day of its maturity, and the debtor subsequently tenders the amount, which is refused by the creditor, his right of action on the note will not revive without a fresh demand of payment.⁷⁰⁹ But if goods are obtained on a note by fraud, and sold to a party with notice, the vendor may bring an action of trover against such party for the goods, without first returning the note to the maker.⁷¹⁰ So, if a note is taken for an agreement to convey land upon its payment, and the maker is let into possession in the meantime, the payee may rescind the agreement on nonpayment of the note, and bring ejectment for the land.⁷¹¹

McCormick v. Peters, 24 Neb. 70, 37 N. W. 927. But see, contra, *Slocumb v. Holmes*, 1 How. (Miss.) 139.

⁷⁰³ *Clifton v. Litchfield*, 106 Mass. 34; *Scearce v. Gall*, 82 Ind. 255.

⁷⁰⁴ *Edmond v. Caldwell*, 15 Me. 340.

⁷⁰⁵ *Buck v. Wilson*, 118 Pa. St. 423, 6 Atl. 97.

⁷⁰⁶ *Norris v. Aylett*, 2 Camp. 329, although it has been transferred.

⁷⁰⁷ *Eames v. Cushman*, 135 Mass. 573.

⁷⁰⁸ *Dillon v. Rimmer*, 1 Bing. 100, 7 Moore, 427.

⁷⁰⁹ *Soward v. Palmer*, 8 Taunt. 277, 2 Moore, 274.

⁷¹⁰ *Stevens v. Austin*, 1 Metc. (Mass.) 557.

⁷¹¹ *Arbuckle v. Hawks*, 20 Vt. 538.

Production and Surrender of Note.

§ 1582. A bill is not payment of a debt where it is surrendered by the creditor before action brought.⁷¹² He may surrender the bill after its dishonor, and bring suit on the original debt.⁷¹³ And, if the vendor of land takes a certificate of deposit by indorsement from the purchaser, he must surrender it before bringing suit for the purchase money.⁷¹⁴ So, if a vendor brings an action to rescind the sale for fraud, he must produce the note taken by him, although this need not be done before commencing his action.⁷¹⁵ Where the bill or note taken by the creditor is negotiable, it must be produced by him to be canceled.⁷¹⁶ This is true, at least, where it is received as a conditional payment, although it is said not to be so where it is received merely as collateral.⁷¹⁷ And where a creditor declares both on the note and the common money counts, if the note is not negotiable, he may recover on the common money counts, on proof of the consideration, without producing the note.⁷¹⁸

⁷¹² *Burden v. Halton*, 4 Bing. 454.

⁷¹³ *Derickson v. Whitney*, 6 Gray (Mass.) 248.

⁷¹⁴ *Leake v. Brown*, 43 Ill. 377.

⁷¹⁵ *Thurston v. Blanchard*, 22 Pick. (Mass.) 18; *Nichols v. Michael*, 23 N. Y. 284; *Hoopes v. Strasburger*, 37 Md. 390. So, if a note is given for goods sold conditionally, they may be replevied on condition broken without first returning or offering to return the note. *Kirby v. Tompkins*, 48 Ark. 273, 3 S. W. 363. So, if the debtor accepts a draft drawn on him by his creditor. *King v. Kelley*, 51 Pa. St. 36.

⁷¹⁶ *Morrison v. Weltey*, 18 Md. 169; *Myers v. Smith*, 27 Md. 43; *Glenn v. Smith*, 2 Gill & J. (Md.) 498; *Ramsay v. Allegre*, 12 Wheat. 611; *Hall v. Engine Co.*, 91 Ala. 363, 8 South. 348; *Jackson v. Brown* (Ga.) 29 S. E. 149; *Woodin v. Frazee*, 38 N. Y. Super. Ct. 190; *Rayburn v. Day*, 27 Ill. 46; *Walsh v. Lennon*, 98 Ill. 27; *Hays v. McClurg*, 4 Watts (Pa.) 452; *Salomon v. Co-operative Co.*, 21 Fla. 374; *Davidson v. Borough of Bridgeport*, 8 Conn. 472. So, as to action to foreclose a collateral mortgage, *Fitch v. McDowell*, 145 N. Y. 498, 40 N. E. 205; or to set aside a conveyance for fraud as against the original debt, *Wilcox v. Packing Co.*, 113 Ala. 519, 21 South. 376. But the exception must be taken at the time. *Bill v. Porter*, 9 Conn. 23. In England, however, if judgment has been rendered without production of the bill, the *fi. fa.* will be stayed until it is produced, *Hadwen v. Mendisabel*, 2 Car. & P. 20, 10 Moore, 477. And see *Raisin v. Thomas*, 88 N. C. 148.

⁷¹⁷ *Plants Mfg. Co. v. Falvey*, 20 Wis. 211.

⁷¹⁸ *Fitch v. Bogue*, 19 Conn. 285.

In like manner, if the creditor takes in payment the negotiable bill of a third person, he may sue for the original debt upon surrender of the dishonored bill.⁷¹⁹ But if he has transferred the instrument, so that he cannot produce and surrender it, he cannot recover in the original action.⁷²⁰ In like manner, he cannot recover upon a renewal without surrendering the original note.⁷²¹ So, if he has taken a draft in part payment, the draft should be surrendered or the judgment reduced by that amount.⁷²² The creditor cannot recover without producing a negotiable bill or note taken by him, unless he can excuse its production, as he may do by proof of its loss or accidental destruction.⁷²³ And where, in an action against a collecting agent for negligence, the defendant sets up a payment made to him by the draft of his local correspondent, which was protested and not paid, he must produce the draft or account for its absence before he can prove that it was protested for nonpayment, and returned to the drawer.⁷²⁴

Effect on Original Defenses.

§ 1583. Where a bill or note is renewed, its force and validity will, in general, be that of the original note.⁷²⁵ If a conveyance is made in fraud of the original note, it will be void as to the renewal

⁷¹⁹ *Tempest v. Ord*, 1 Madd. 89; *Alcock v. Hopkins*, 6 Cush. (Mass.) 484; *Spear v. Atkinson*, 23 N. C. 262.

⁷²⁰ *Harris v. Johnston*, 3 Cranch, 311; unless it is retransferred and can be produced at the trial, *Burden v. Halton*, 4 Bing. 454.

⁷²¹ *Miller v. Ritz*, 3 E. D. Smith (N. Y.) 253.

⁷²² *Hodgen v. Latham*, 30 Ill. 188.

⁷²³ *Holmes v. D'Camp*, 1 Johns. (N. Y.) 34; *Angel v. Felton*, 8 Johns. (N. Y.) 149; *Burdick v. Green*, 15 Johns. (N. Y.) 247; *Raymond v. Merchant*, 3 Cow. (N. Y.) 147; *Matthews v. McClure*, 20 Md. 248; *Mauney v. Colt*, 86 N. C. 463; *Pipes v. Norton*, 47 Miss. 61; *The Charlotte v. Lumm*, 9 Mo. 64; *Upton v. Paxton* (Iowa) 29 N. W. 809. So, a note given to a third person may be surrendered, or its loss proved. *McConnell v. Stettinius*, 7 Ill. 707.

⁷²⁴ Defendant must produce the draft or account for its absence, and he must show that the nonpayment was not by his fault. *Simpson v. Waldby*, 63 Mich. 447, 30 N. W. 199.

⁷²⁵ E. g. the renewal of a premium note to a mutual insurance company. *Howard v. Iron Co.*, 64 Me. 93. As to the renewal of illegal instruments, see § 536, *supra*.

also.⁷²⁶ But where the payee's charter only authorizes it to take premium notes payable "within 12 months," and an original note is held on that account to be void, because payable "12 months after date," the renewal of such note may cure the defect.⁷²⁷ On the other hand, if a note is held in trust, the renewal will be subject to the same trust, if it can be identified in the hands of the payee.⁷²⁸ The renewal of a note will, in like manner, bear the character of the original, as regards a homestead exemption law.⁷²⁹

In other cases, a renewal has been held to destroy the former contract, or to waive the defenses belonging to it;⁷³⁰ e. g. to bring it within the meaning of an intervening law as to insolvent debtors, which was not applicable to the original note.⁷³¹ But the drawer of a lost draft will not be liable on a "duplicate" for it, if he has been already discharged without his knowledge by the holder's laches as to the original draft.⁷³² So, if the maker renews a note, which has been altered, without notice of the alteration.⁷³³ On the other hand, where a note is made payable when a railroad is completed, and another note is afterwards substituted, payable at a certain time, it will be a waiver of the condition of the first note.⁷³⁴ But if a machine is sold with a warranty, and a note is given for it, the renewal of the note will not be conclusive evidence of the waiver of a claim growing out of the prior breach of warranty.⁷³⁵

Original Consideration—Illegality.

§ 1584. A bill of exchange given in renewal is, in general, subject to any defense based upon the consideration of the original

⁷²⁶ Thomson v. Hester, 55 Miss. 656. And see § 1534, supra.

⁷²⁷ Osgood v. Toole, 1 Hun (N. Y.) 167.

⁷²⁸ Andrews v. Bank, 3 Allen (Mass.) 313.

⁷²⁹ Wood v. Lord, 51 N. H. 448. So, obiter, Strachn v. Foss, 42 N. H. 43; Kibbey v. Jones, 7 Bush (Ky.) 243.

⁷³⁰ Wickenkamp v. Wickenkamp, 77 Ill. 92.

⁷³¹ Wyman v. Fabens, 111 Mass. 77.

⁷³² Benton v. Martin, 40 N. Y. 345. See § 1191, supra.

⁷³³ Fraker v. Cullum, 21 Kan. 555.

⁷³⁴ Four Mile Val. R. Co. v. Bailey, 18 Ohio St. 208; O'Donald v. Railroad Co., 14 Ind. 259.

⁷³⁵ Aultman v. Wheeler, 49 Iowa, 647.

bill.⁷³⁶ If the original is without consideration, and is therefore void, the renewal will be so.⁷³⁷ But it has been held that an extension of time to the maker, coupled with a release of the original indorser, will even in such case be a good consideration for the renewal.⁷³⁸ If the original consideration was illegal, the defense may be set up, in like manner, to the renewal,⁷³⁹ unless the renewal is made to a bona fide holder of the original note.⁷⁴⁰ So, fraud in the original note is admissible against the original payee as a defense to the renewal.⁷⁴¹

But if a note made by A. to B., and indorsed by C. and D., and afterwards by B., is taken up by a bill drawn by C. on D., and accepted by D., thereby releasing A., the defendant in a suit upon the bill cannot go into the consideration of the original note.⁷⁴² So, if a second note is sent by the indorser of the first note to his indorsee for the purpose of renewal, and the renewal is refused by the indorsee, but the new note afterwards purchased by him from the maker with full notice, he cannot deny, in an action upon the first note, that he took the second note for the intended purpose of a renewal.⁷⁴³ If, however, an original note is made to a national bank for a loan by the payee exceeding the legal restrictions, and the

⁷³⁶ *Hynds v. Hays*, 25 Ind. 31. If the original consideration is good, it supports the renewal. *King v. Doane*, 139 U. S. 166, 11 Sup. Ct. 465. If it fails, the renewal fails. *Wheelock v. Berkeley*, 138 Ill. 153, 27 N. E. 942; *Tyler v. Anderson*, 106 Ind. 185, 6 N. E. 600; *Hooker v. Hubbard*, 97 Mass. 175, s. c. 102 Mass. 239. So, the original note is not a waiver of partial failure of the original agreement, where damages were claimed and reserved at the time. *Davis Provision Co. v. Fowler*, 20 App. Div. 626, 47 N. Y. Supp. 205.

⁷³⁷ *Hill v. Buckminster*, 5 Pick. (Mass.) 391; *Royer v. Bank*, 83 Pa. St. 248; *Turle v. Sargent*, 63 Minn. 211, 65 N. W. 349.

⁷³⁸ *Gatzmer v. Pierce*, 13 Phila. (Pa.) 88.

⁷³⁹ *Holden v. Cosgrove*, 12 Gray (Mass.) 216; *Alabama Nat. Bank v. Halsey*, 109 Ala. 393, 19 South. 522. So, if void for coverture. *Union Stock-Yards Nat. Bank v. Coffman*, 101 Iowa, 594, 70 N. W. 693; *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804; *Continental Nat. Bank v. Clarke* (Ala.) 22 South. 988. But renewal by the widow is a waiver. *Harrisburg Nat. Bank v. Bradshaw*, 178 Pa. St. 180, 35 Atl. 629.

⁷⁴⁰ *Calvert v. Williams*, 64 N. C. 168.

⁷⁴¹ *Case v. Grim*, 77 Ind. 565; though the original note had been transferred, and retransferred to the payee, *Sawyer v. Wiswell*, 9 Allen (Mass.) 39.

⁷⁴² *Estep v. Burke*, 19 Ind. 87.

⁷⁴³ *Hooker v. Hubbard*, 97 Mass. 175, affirmed in 102 Mass. 239.

amount is afterwards reduced upon a renewal, and brought within the limits of the law, the defense, if available against the original note, could not be set up against the renewal thus purged.⁷⁴⁴

Usury in Original Bill.

§ 1585. The renewal of a note will not remove the taint of usury from the original instrument,⁷⁴⁵ even though a temporary novation has intervened, and is followed by a renewal of the original note.⁷⁴⁶ So, a note given for the balance due on other usurious notes is tainted with usury;⁷⁴⁷ and the original usury is not cured by giving a renewal with additional parties.⁷⁴⁸ Where, however, a note is given to a guardian, and afterwards assigned to the ward, and a renewal given direct to the ward, the maker cannot set up the original usury.⁷⁴⁹ But where the original note is made to A., and by him transferred to B., and a new note is given for it, and made payable to B., the original usury will remain, although the maker would be estopped from setting it up against a bona fide purchaser.⁷⁵⁰ And although on the renewal of a usurious note the unlawful excess is indorsed as paid

⁷⁴⁴ *Allen v. Bank*, 23 Ohio St. 97.

⁷⁴⁵ *Knapp v. Briggs*, 2 Allen (Mass.) 551; *National Bank of Auburn v. Lewis*, 75 N. Y. 516; reversing 10 Hun (N. Y.) 468; *Bank of Cadiz v. Slemmons*, 34 Ohio St. 142; *House v. Davis*, 60 Ill. 367; *King v. Trust Co.*, 57 Ala. 118; *McGee v. Long*, 83 Ga. 156, 9 S. E. 1107; *Harris v. Bressler*, 119 Ill. 471, 10 N. E. 188; *Jones v. Rider*, 60 N. H. 452; *Jacks v. Nichols*, 3 Sandf. Ch. (N. Y.) 313, reversed in 5 Barb. (N. Y.) 38, affirmed in 5 N. Y. 178; *Fulton Bank v. Phoenix Bank*, 1 Hall (N. Y.) 619; *Cake v. Bank*, 86 Pa. St. 303; *Overholt v. Bank*, 82 Pa. St. 490; *National Bank v. Eyre*, 52 Iowa, 114, 2 N. W. 995; although the form of the note is changed, *Mathews' Adm'r v. Bank* (Va.) 27 S. E. 609. And such renewal is therefore not a valid payment to bar the statute of limitations, *Rudd v. Bank*, 78 Ky. 513; and the excess paid on the original debt can be deducted upon the renewal, *Miller v. Irwin*, 85 Pa. St. 376.

⁷⁴⁶ *Archer v. McCray*, 59 Ga. 547.

⁷⁴⁷ *Cottrell v. Southwick*, 71 Iowa, 50, 32 N. W. 22.

⁷⁴⁸ *Riegel's Appeal* (Pa.) 21 Cent. Law J. 137, 16 W. N. C. 221; or with two of the three original parties, *Siesel v. Harris*, 48 Ga. 652.

⁷⁴⁹ *Stone v. McConnell*, 1 Duv. (Ky.) 54.

⁷⁵⁰ *Treadwell v. Archer*, 76 N. Y. 196, reversing *Sherwood v. Archer*, 10 Hun (N. Y.) 73.

without the maker's consent, and for the purpose of purging the note from usury, it will still be bad.⁷⁵¹

If, however, a bill tainted with usury is renewed after repeal of the usury law, it will be a valid instrument.⁷⁵² So, a note which is executed to raise money to take up a former note is not a renewal, although the parties may be the same, and will not be affected by usury in the original note.⁷⁵³ So, where the note of a third party is given in consideration of usury already paid on a former note, it will not be affected by the taint in the original note.⁷⁵⁴ And it has been held that the parties to a usurious note may reform their contract, and remove the original taint by giving a renewal for that purpose bearing lawful interest.⁷⁵⁵ And an accommodation indorser may take up a note which the maker had discounted without his knowledge at a usurious rate of interest, and take from the maker a valid note in consideration of such payment.⁷⁵⁶ So, the surety on a usurious note may give his own note in renewal, for a valuable consideration received from the principal.⁷⁵⁷

⁷⁵¹ *National Bank v. Eyre*, 52 Iowa, 114, 2 N. W. 995.

⁷⁵² *Flight v. Reed*, 1 Hurl. & C. 703; *Story v. Kimbrough*, 33 Ga. 21.

⁷⁵³ *Dewey v. Bell*, 5 Allen (Mass.) 165. So, if the usurious note is paid off, and a new security given. *Smith v. Stoddard*, 10 Mich. 148.

⁷⁵⁴ *Smith v. Young*, 11 Bush (Ky.) 393.

⁷⁵⁵ *Gerlaugh v. Bassett*, 20 Wis. 671.

⁷⁵⁶ *Cassebeer v. Kalbfleisch*, 11 Hun (N. Y.) 119.

⁷⁵⁷ *Tenny v. Porter*, 61 Ark. 320, 33 S. W. 211.

CHAPTER XLII.**ACTION.****I. TIME FOR BRINGING ACTION.****II. PARTIES TO ACTIONS.**

I. TIME FOR BRINGING ACTION.

- § 1586. Before Maturity—On Day of Maturity.
- 1587. Against Indorser.
- 1588. On Nonacceptance.
- 1589. On Maturity of Installments—Interest.
- 1590. Against Principal Debtor.
- 1591. Statute of Limitations—Fraud.
- 1592. — Bars Set-Off.
- 1593. — Proof by Barred Note—Pleading.
- 1594. — What Law Governs.
- 1595. — American and Foreign Statutes.
- 1596. — Exceptions for Nonsuit, etc.
- 1597. — Duebills and Certificates—Bank Notes—Coupons.
- 1598. — Checks—Sealed Notes.
- 1599. — Attested Notes.
- 1600. — Collateral Securities.
- 1601. — Against State—Decedents' Estates.
- 1602. — Disabilities Excepted.
- 1603. — Joint Obligations—Principal and Surety.
- 1604. — Time Reckoned from Maturity.
- 1606. — Time Reckoned—In What Manner.
- 1607. — Time Reckoned—Demand Notes.
- 1608. — Time Reckoned from Demand.
- 1609. — Time Reckoned from Payment.
- 1610. — Exceptions—Alien Enemy.
- 1611. — Nonresidence.
- 1613. Acknowledgment—New Promise.
- 1614. — Sufficiency.
- 1615. — Insufficiency.
- 1616. — Verbal—Conditional.
- 1617. — Promise by Agent—Executor—Surety.
- 1618. — Promise by Joint Maker.
- 1619. — To Whom and How Made.
- 1620. — How Proved.

§ 1621. Part Payment.

- 1622. — Payment on Collateral—Involuntary.
- 1623. — Payment—How Made.
- 1624. — Payment—How Proved—Indorsement by Debtor.
- 1625. — Indorsement by Holder.
- 1626. — Part Payment by Joint Maker.
- 1628. — Payment by Survivor—Executor.
- 1629. — Payment by Indorser—Surety—Agent.
- 1630. — Payment—To Whom Made.

Action before Maturity—On Day of Maturity.

§ 1586. Before a bill matures, no action can, in general, be brought upon it. And this applies to an attachment against an absconding debtor,¹ or to a common-law action against a party who had declared himself insolvent,² or to a bill in equity to set aside a fraudulent conveyance.³ But an indorser may take up a note before maturity, and sue the maker at once for fraud in inducing him to sign it.⁴ And, in general, a plea to the merits is a waiver of the objection that the suit was brought too soon.⁵ And a judgment rendered on a note cannot, a fortiori, be questioned collaterally on that ground.⁶

But in some states suit may be brought on the very day a bill falls due, after refusal of payment and close of business hours.⁷ And in Massachusetts it has been held that a writ may be issued against the maker on that day, if it is not delivered to the sheriff until the next day.⁸ An accommodation acceptor may begin an action against the

¹ Wiesinger v. Bank, 106 Mich. 291, 64 N. W. 59; Gordon v. Parmelee, 15 Gray, 413; Altmeyer v. Caulfield, 37 W. Va. 847, 17 S. E. 409; Jones v. Brown, 167 Pa. St. 395, 31 Atl. 647.

² Douglas v. Bank, 97 Tenn. 133, 36 S. W. 874.

³ McGhee v. Bank, 93 Ala. 192, 9 South. 734; Freider v. Lieukauft, 92 Ala. 460, 8 South. 758; Evans v. Thornburg, 77 Ind. 106.

⁴ Davison v. Farr, 18 Misc. Rep. 124, 41 N. Y. Supp. 170.

⁵ Fiore v. Ladd, 29 Or. 528, 46 Pac. 144.

⁶ Robertson v. Huffman, 92 Ind. 247.

⁷ 2 Daniel, Neg. Inst. 239; 2 Pars. Notes & B. 461. And see Story, Prom. Notes, § 225; Veazie Bank v. Paulk, 40 Me. 109; Coleman v. Ewing, 4 Humph. (Tenn.) 241; Wilson v. Williman, 1 Nott & McC. (S. C.) 440; McKenzie v. Durant, 9 Rich. Law (S. C.) 61; Helse v. Bumpass, 40 Ark. 545. So, after refusal at 3 p. m., when there was no bank in the place. Ammidown v. Woodman, 31 Me. 580.

⁸ Butler v. Kimball, 5 Metc. 94; although it would be premature to serve

drawer on that day, although the bill was taken up by him before it matured; since the drawer's liability arises at once upon payment by such acceptor at any hour on the day of maturity.⁹ If a demand note is not entitled to grace, the holder may bring suit at once without further demand.¹⁰ But if a note is entitled to grace, an action brought on the day it is due, without such allowance of grace, will be premature.¹¹ If the action is brought on the day the note becomes due, with grace, it must appear that a demand of payment had been already made at a reasonable hour, or that the action was not begun until after the close of banking hours.¹² And where a note is payable before the end of banking hours, as has been held to be the case with post notes of a bank, suit may be brought after the close of such hours.¹³ But if the note is not shown to be payable at bank or within bank hours, and if no prior demand and refusal is shown, a suit begun at 3:30 p. m. on the last day of grace will be clearly premature.¹⁴

In New York, as well as in other states, an action cannot be begun on the last day of grace, even after bank hours, and although the note is payable at bank and payment has been refused.¹⁵ Where an action was brought at 12:01 a. m. on the last day of grace on a note payable at bank, and not due until the close of banking hours, nor pre-

such writ even after dusk on the last day of grace, *Estes v. Tower* 102 Mass. 65.

⁹ *Whitwell v. Brigham*, 19 Pick. 117.

¹⁰ *Cammer v. Harrison*, 2 McCord (S. C.) 246; so, too, a duebill, *Dews v. Eastham*, 2 Yerg. (Tenn.) 463; 2 *Daniel*, Neg. Inst. 243.

¹¹ *Hinton v. Duff*, 11 C. B. (N. S.) 724; *Hogan v. Cuyler*, 8 Cow. (N. Y.) 203; *Seaton v. Hinneman*, 50 Iowa, 395; *Cox v. Reinhardt*, 41 Tex. 591; or on the second day of grace, *Thomas v. Shoemaker*, 6 Watts & S. (Pa.) 179; but in Texas it is sufficient if the note matures pendente lite, *Dignowitty v. Alexander*, 25 Tex. Supp. 162; *Culbertson v. Cabeen*, 29 Tex. 247.

¹² *Veazie Bank v. Winn*, 40 Me. 62.

¹³ *Staples v. Bank*, 1 Metc. (Mass.) 43.

¹⁴ *Vandesande v. Chapman*, 48 Me. 262.

¹⁵ *Smith v. Aylesworth*, 40 Barb. (N. Y.) 104; *Oothout v. Ballard*, 41 Barb. (N. Y.) 33; *Bevan v. Eldridge*, 2 Miles (Pa.) 353; *Farmers' Nat. Bank v. Salina Paper Mfg. Co.*, 58 Kan. 207, 48 Pac. 863; *Estes v. Tower*, 102 Mass. 65; *Wiesinger v. Bank*, 106 Mich. 291, 64 N. W. 59; *Satcliffe v. Humphreys*, 58 N. J. Law, 42, 32 Atl. 706; *Hamilton Gin & Mill Co. v. Sinker, Davis & Co.*, 74 Tex. 51, 11 S. W. 1056. So, *Kennedy v. Thomas* [1894] 2 Q. B. 759; *Wells v. Giles*, 2 Gale, 209.

viously dishonored, it is plainly premature.¹⁶ And in many states an action cannot be brought against the maker of a note at any hour on the last day of grace.¹⁷ And, if it is payable one day after date, suit cannot be brought on the day after it is made.¹⁸ In states where an action cannot be brought on a note on the day it falls due, the defect will not be cured by a judgment taken in such action by default.¹⁹ On the other hand, where a note is payable on demand and due at once, it has been held that a suit may be brought on it at any time.²⁰ And, where it is payable "on or before" a given day, suit may be brought without proving a previous demand.²¹

Action against Indorser.

§ 1587. The indorser's liability, being conditioned by the law merchant on notice of dishonor properly given, has been said not to commence until such notice is given, where there is no excuse or waiver to dispense with it. But action may be begun against an indorser immediately after mailing the notice of dishonor to him,²² on the very day the note becomes due and is dishonored.²³ It has been held, how-

¹⁶ Church v. Clark, 21 Pick. (Mass.) 310. So, a demand at 8 a. m. will not sustain an action immediately afterwards, on the day of maturity. Lunt v. Adams, 17 Me. 230.

¹⁷ Osborn v. Moncure, 3 Wend. (N. Y.) 170; Bell v. Sackett, 38 Cal. 407; Benson v. Adams, 69 Ind. 353; Wiggle v. Thomason, 11 Smedes & M. (Miss.) 452. And an attorney cannot, therefore, recover costs from his client on discontinuing such suit. Hopping v. Quin, 12 Wend. (N. Y.) 517. So, it has been held that an indorser cannot be sued on the last day of grace. Bevan v. Eldridge, 2 Milles (Pa.) 353.

¹⁸ Davis v. Eppinger, 18 Cal. 378; Taylor v. Jacoby, 2 Pa. St. 495; Moore v. Hollaman, 25 Tex. Supp. 81.

¹⁹ Randolph v. Cook, 2 Port. (Ala.) 286.

²⁰ Hill v. Henry, 17 Ohio, 9. So, where there is an indefinite agreement for forbearance, suit may be brought at any time without previous demand. Finch v. Skilton, 79 Hun, 531, 29 N. Y. Supp. 923.

²¹ Dunkle v. Nichols, 101 Ind. 473; but not until after the day named, Moore v. Horsley, 42 Ark. 163.

²² Daniel, Neg. Inst. 243; 2 Pars. Notes & B. 462; Coleman v. Ewing, 4 Humph. (Tenn.) 241. And the indorser cannot plead that the action was begun before a reasonable time had elapsed after notice of dishonor sent him. Siggers v. Lewis, 1 Crompt. M. & R. 370, 4 Tyrw. 847.

²³ Greeley v. Thurston, 4 Me. 479; Crenshaw v. McKiernan, Minor (Ala.) 295.

ever, and seems to be the rule, in England, that no action can be begun against the indorser until a reasonable time has passed for him to receive the notice;²⁴ and that it is too soon to bring suit on the day the note falls due, after protesting it and sending notice to him by mail.²⁵ Where the notice was sent on the last day of grace, and suit begun on the next day, before the notice could be received, it has been held not to be premature;²⁶ although in the same state the contrary was held, where the suit was begun on the day of maturity, and the notice given to the notary before, but served on the indorser personally afterwards.²⁷ But if the writ is delivered to the officer before the notice is sent, to be served afterwards, it will be sufficient.²⁸

Action on Nonacceptance.

§ 1588. Where a bill is dishonored by the drawee's refusal to accept it, an action lies on it at once, without waiting for the day named in it for payment, against the drawer²⁹ or indorser.³⁰

But where the indorser promises "to pay within two years," an action will not lie against him before the end of such time.³¹ The time for payment of a note is not, however, extended by a stipulation for interest to begin at a day named, after maturity of the note; and an action will lie meanwhile on dishonor of the note at maturity, such interest not being included in the judgment.³² If a note is payable

²⁴ *Castrique v. Bernabo*, 6 Q. B. 498; *Smith v. Bank*, 5 Serg. & R. (Pa.) 318.

²⁵ *Manchester Bank v. Fellows*, 28 N. H. 302.

²⁶ *Shed v. Brett*, 1 Pick. (Mass.) 401; *Flint v. Rogers*, 15 Me. 67. .

²⁷ *New England Bank v. Lewis*, 2 Pick. (Mass.) 125.

²⁸ *Seaver v. Lincoln*, 21 Pick. (Mass.) 267.

²⁹ *Benj. Chalm. Dig. art. 48*; 2 *Daniel, Neg. Inst.* 244; *Milford v. Mayor*, 1 *Doug.* 55; *Bright v. Purrier*, 3 *Burrows*, 1687; *Watson v. Tarpley*, 18 *How.* 517; *Serry v. Robinson*, 1 *Day (Conn.)* 11; *Roosevelt v. Woodhull*, *Anth. N. P. (N. Y.)* 50; *Watson v. Loring*, 3 *Mass.* 557; *Weldon v. Buck*, 4 *Johns. (N. Y.)* 144; *Winthrop v. Pepoon*, 1 *Bay (S. C.)* 468. So, by statute in Texas. *Rev. St. art. 264*. And see § 1136, *supra*. But this suit cannot be brought on presentment and protest for better security. § 1147, *supra*. *Taan v. Le Gaux*, 1 *Yeates (Pa.)* 204. But in such case interest and damages are not recoverable.

³⁰ *Ballingalls v. Gloster*, 3 *East*, 481; *Watson v. Loring*, 3 *Mass.* 557; *Lenox v. Cook*, 8 *Mass.* 460; *Morgan v. Towles*, 8 *Mart. O. S. (La.)* 730.

³¹ *Koutz v. Van Cleaf*, 55 *Cal.* 345.

³² *Billingsley's Adm'r v. Billingsley*, 34 *Ala.* 518.

conditionally, an action will not lie until the happening of the event named.³² And, in general, no action can be brought upon a bill or note until it becomes due by its terms, except in the case of non-acceptance.³⁴

Maturity of Installments—Interest.

§ 1589. Where a note or bill is payable in installments, an action will lie upon each installment as it becomes due.³⁵ And, if it is secured by a collateral mortgage, the mortgagee will be entitled to possession of the land on default of an installment.³⁶ So, a mortgage securing several notes may be foreclosed when the first falls due, and the decree may cover others which have matured after the commencement of the action.³⁷

Where the interest on a note is made payable annually, an action may be brought to recover it before the principal is due.³⁸ And a subsequent action for the principal will not be barred by a judgment already recovered for such interest.³⁹ But if the interest is payable annually, with an option to the maker to make it part of the principal in case of default, no action can be brought for it until the principal becomes due.⁴⁰ If the principal itself becomes due at the holder's

³² *Grimison v. Russell*, 20 Neb. 337, 30 N. W. 249.

³⁴ Although it is accompanied by a warrant of attorney to confess judgment at any time. *Spier v. Corll*, 33 Ohio St. 236.

³⁵ 2 Daniel, Neg. Inst. 244. And see § 1047, *supra*. Several actions lie, a fortiori, on distinct notes, *Nickerson v. Rockwell*, 90 Ill. 460; but, as to a demand note securing several installments, see *Siddall v. Rawcliff*, 1 Moody & R. 263, 1 Crompt. & M. 487.

³⁶ *Estabrook v. Moulton*, 9 Mass. 258.

³⁷ *Hanford v. Robertson*, 47 Mich. 100, 10 N. W. 125.

³⁸ *Greenleaf v. Kellogg*, 2 Mass. 568; *Cook v. Wiles*, 42 Mich. 439, 4 N. W. 169; *Bannister v. Roberts*, 35 Me. 75; *Walker v. Kimball*, 22 Ill. 537; *Ray v. Pease*, 97 Ga. 618, 25 S. E. 360; *Catlin v. Lyman*, 16 Vt. 44; *Howes v. Bennett* (Me.) 3 Atl. 661. And see § 1048, *supra*. So, as to interest coupons, before other coupons become due. *Boyer v. Chandler*, 160 Ill. 394, 43 N. E. 803.

³⁹ *Sparhawk v. Wills*, 6 Gray (Mass.) 163; *Kurz v. Suppliger*, 18 Ill. App. 630; *Dulaney v. Payne*, 101 Ill. 325.

⁴⁰ *Wood v. Whisler*, 67 Iowa, 676, 25 N. W. 847.

option, on default in the interest, the holder may bring an action for principal and interest, after notice that he has exercised the option.⁴¹

Action against Principal Debtor.

§ 1590. In some states an indorser or surety cannot be sued until an action is first brought against the maker or principal. But such an action has been held not to be necessary, where the maker is known to be insolvent.⁴² So, a delay for more than a year in suit against the maker has been held to be excused by the indorser's request and promise to "stand good for the amount."⁴³ In Texas, the statute requires that suit be brought against the maker or acceptor at the next term of the court, in order to charge indorsers and drawer.⁴⁴ Such suit is not necessary, however, in order to charge the acceptor himself.⁴⁵

Where an action is brought by a surety against his principal, or by an indorser against the maker, he must, in general, have first paid the note himself.⁴⁶ But where the indorser has agreed with the maker, for a valuable consideration, to pay his note, and is afterwards released by the holder, and a new debtor accepted in his stead, the original maker may bring an action against the new debtor for nonperformance of his agreement, without first paying the note himself.⁴⁷

So, where the maker gives a collateral mortgage to indemnify an indorser, such mortgage may be foreclosed before the note is paid by the indorser.⁴⁸ And suit may be brought on a collateral note held by

⁴¹ *Dean v. Applegarth*, 65 Cal. 301, 4 Pac. 375. And see § 1047, *supra*, and § 1604, *infra*.

⁴² *Clark v. Young*, 1 Cranch, 181, in *Virginia*. So, in *Indiana*. *Couch v. Bank*, 64 Ind. 92. And see § 931 *et seq.*, *supra*.

⁴³ *Davis v. Leitzman*, 70 Ind. 275.

⁴⁴ *Smith v. Harbert's Adm'r*, 30 Tex. 669; Rev. St. art. 262. But the maker or acceptor must be sued at the first or (if good cause for delay is shown) at the second term of court, in order to fix the liability of other parties. *Id.* And in ALABAMA there is a similar requirement as to nonnegotiable instruments (Code, §§ 1778-1782); but this is not a statute of limitation, *McClelland's Adm'r v. Slauter*, 30 Tex. 497. And see § 935, *supra*.

⁴⁵ But an accommodation acceptor may require the holder to sue at once on maturity. *Van Alstyne v. Sorley*, 32 Tex. 518.

⁴⁶ *Borum v. Reed*, 73 Mo. 461.

⁴⁷ *Sapp v. Faircloth*, 70 Ga. 690.

⁴⁸ *Hapgood v. Wellington*, 136 Mass. 217. As to suits on collateral, see § 1677, *infra*.

a creditor, when it matures, without first resorting to the original debtor for payment.⁴⁹ So, an agreement in a collateral mortgage, postponing its foreclosure, will not suspend the holder's right to sue on the note secured as soon as it becomes due.⁵⁰

Statute of Limitations—Fraud.

§ 1591. The statute, limiting the time within which actions upon personal contract and for personal property may be brought, dates in Great Britain from the year 1623.⁵¹ This statute does not destroy the debt, but simply bars the remedy after the time limited.⁵² And, independent of the statute, a note will be presumed to be paid after a lapse of 20 years.⁵³ The statute of limitations is available in answer to a proof of debt under a petition in bankruptcy.⁵⁴ And, although not strictly applicable to proceedings in equity, it is adopted there also as a general rule of procedure.⁵⁵ And where equity and law procedures are blended, as in Mississippi, it may be set up by demurrer to a bill in equity.⁵⁶ So, where a creditors' bill is filed to enforce an implied trust in the proceeds of a note held by a surety for his indemnity, and transferred by him to the defendant, the remedy will be barred by the statute, unless fraud is alleged, although the complain-

⁴⁹ *Lisby v. O'Brien*, 4 Watts (Pa.) 141.

⁵⁰ *Sweeney v. Bixler*, 60 Ala. 539.

⁵¹ Byles, Bills, 343; Chit. Bills, 683; 21 Jac. I. c. 16; 3 & 4 Wm. IV. c. 42.

⁵² Byles, Bills, 344; 2 Edw. Bills & N. § 957; 2 Pars. Notes & B. 631; *Quantock v. England*, 5 Burrows, 2628, 2 W. Bl. 703; *Williams v. Jones*, 13 East, 450; *Chapple v. Durston*, 1 Crompt. & J. 1; *Mavor v. Pyne*, 2 Car. & P. 91. And collateral afterwards given for "subsisting" debts would include a note that was barred, but still unpaid. *Townsend v. Tyndale*, 165 Mass. 293, 43 N. E. 107.

⁵³ Byles, Bills, 364; *Duffield v. Creed*, 5 Esp. 52; although the maker is a nonresident, *Sanderson v. Olmsted*, 2 Pin. (Wis.) 224; but the presumption of payment may be rebutted by death of the drawer in the midst of war and by other circumstances, *Hopkirk v. Page*, 2 Brock. 20, Fed. Cas. No. 6,697.

⁵⁴ *Ex parte Dewdney*, 15 Ves. 479; although the objection could not be taken by a stranger, *Swayne v. Wallinger*, 2 Strange, 746.

⁵⁵ *Johnson v. Smith*, 2 Burrows, 961; *Prince v. Heylin*, 1 Atk. 493; in analogous cases, at least, *Stackhouse v. Barnston*, 10 Ves. 466.

⁵⁶ *McNair v. Stanton*, 57 Miss. 298.

ant avers that the trust had only come to his knowledge within two years.⁵⁷

But the statute will not run against an action brought to recover an overpayment made by mistake upon a check, which was discovered and fraudulently concealed by the defendant.⁵⁸ So, in general, where the cause of action has been fraudulently concealed from the plaintiff, unless he had ample means of knowledge, with the exercise of ordinary prudence.⁵⁹ So, an action will lie upon a fraudulent promise of the maker, by means of which he obtained possession of the note and kept it until it was barred by the statute.⁶⁰ But if the plaintiff in such case elects to sue on the note itself, on discovery of the fraud, as on a lost note, he will be barred by the ordinary limitation.⁶¹ Where a bank pays a forged check, and the forgery is not discovered by it until more than six years after, it may still sue, as we have seen, for the recovery of the money paid.⁶² So, if a note is renewed by forgery without the knowledge of the accommodation maker, and the fraud is not discovered for some time, it has been held that the maker will remain liable on the original note for six years after the fraud is discovered.⁶³

Statute Bars Set-Off.

§ 1592. In order to bar a set-off pleaded by the defendant, the same period of six years must have expired before the action is brought.⁶⁴ And the defendant cannot be deprived of his set-off by the plaintiff's

⁵⁷ *Martin v. Bank*, 31 Ala. 115; *Brunson v. Ballou*, 70 Iowa, 34, 29 N. W. 794; or from the time when the plaintiff learns that the surety claims to have already accounted, *Wolf v. Wolf*, 97 Iowa, 279, 66 N. W. 170.

⁵⁸ *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313, 11 N. E. 81. In an equitable action to correct a mistake, the statute runs from the time when it should have been, with ordinary care, discovered. *Gould v. Emerson*, 160 Mass. 438, 35 N. E. 1065.

⁵⁹ *McKown v. Whitmore*, 31 Me. 448. So, by statute, in INDIANA (*Horner's Rev. St. § 300*), and MASSACHUSETTS (*Pub. St. c. 197, § 14*). And see § 1596, *infra*.

⁶⁰ *Cockrill v. Hall*, 65 Cal. 326, 4 Pac. 33; *Civ. Code*, §§ 1709, 1710.

⁶¹ *Miles v. Berry*, 1 Hill (S. C.) 296.

⁶² *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106, affirming 48 N. Y. Super. Ct. 1.

⁶³ *Irwin v. Freeman*, 13 Grant, Ch. (U. C.) 465.

⁶⁴ *Byles, Bills*, 348; *Walker v. Clements*, 15 Q. B. 1046.

discontinuing his action after set-off pleaded, and beginning a fresh action after the set-off had become barred by the statute.⁶⁵ But where actions on account are barred in five years, and actions on notes in six, an account between the parties to a note in the maker's favor may be barred as a set-off after the five years, although action will still lie on the note.⁶⁶ The statute of limitations may be pleaded to a set-off,⁶⁷ but the right to plead it may be waived by an absolute promise to pay.⁶⁸

If a note is paid with the proceeds of the discount of a new note made by the same parties, and the original note is surrendered, a new debt is created, for which an action will lie from the date of the new note; and such action may be maintained within one year from that time against the stockholders of a corporation, under a statute limiting such actions to one year.⁶⁹ But a similar action does not arise by the renewal of a note given for goods purchased, and the statute will run in such case from the time when the goods were sold.⁷⁰

Proof by Barred Note—Pleading.

§ 1593. Even where a note is outlawed, it may still be admitted as evidence of the debt under the money counts,⁷¹ or as evidence of the amount due on a collateral mortgage, which the creditor began to foreclose before the note fell due.⁷² So, suit may be brought on an

⁶⁵ *Parsons v. Crabb*, 34 U. C. Q. B. 136, 31 U. C. Q. B. 435.

⁶⁶ *Stanwood v. Smith*, 3 Ill. App. 647. In ILLINOIS a set-off may be pleaded, although barred against any plaintiff when cause of action accrued before it was barred, but not as against a bona fide assignee of a negotiable instrument assigned before maturity. Hurd's Rev. St. c. 83, § 17.

⁶⁷ And the running of the statute against the set-off is not stayed by the bankruptcy of the maker, against whom it is offered. *Harwell v. Steel*, 17 Ala. 372. But in Massachusetts, at the suit of an insolvent payee, debts due more than six years before action, and less than six years before the plaintiff's insolvency, may be set off. *Parker v. Sanborn*, 7 Gray, 191.

⁶⁸ *Amonett v. Montague*, 75 Mo. 43; but a request by a surety for time is not a waiver, § 924, *supra*.

⁶⁹ *Fisher v. Marvin*, 47 Barb. (N. Y.) 159.

⁷⁰ *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

⁷¹ *Michael v. Tuttle*, 37 Mich. 502.

⁷² *Cheney v. Woodruff*, 20 Neb. 124, 29 N. W. 275; *Cheney v. Janssen*, 20 Neb. 128, 29 N. W. 289.

account for which the creditor took a note, although the note itself had then become barred by the statute.⁷³ After judgment is rendered on the note, the note is merged in the judgment, and the statute runs from that time upon the judgment debt.⁷⁴

In Great Britain, since the rules of 4 Wm. IV., the statute must in all cases be specially pleaded.⁷⁵ The defendant should plead "that the action did not accrue within six years,"⁷⁶ and not "that the defendant did not undertake within six years."⁷⁷ And, if a set-off is pleaded, the statute of limitations must be replied specially.⁷⁸ And such replication admits the alleged set-off, and only raises the question whether it accrued within the six years.⁷⁹

What Law Governs.

§ 1594. In general, the statute of limitations of the place where the suit is brought is the only one to be considered.⁸⁰ But if a surety is

⁷³ *McGuire v. Bidwell*, 64 Tex. 43.

⁷⁴ *Hopkins v. Stout*, 6 Bush (Ky.) 375; and a bill of exchange founded on such judgment is, in like manner, taken out of the operation of the statute, *Cherry v. Lamar*, 58 Ga. 541.

⁷⁵ *Byles, Bills*, 344; 2 *Daniel, Neg. Inst.* 245; *Chapple v. Durston*, 1 *Crompt. & J.* 1, overruling *Anon.*, 1 *Salk.* 278. This was formerly held to be unnecessary where it appeared by the declaration that the action was begun too late. *Brown v. Hancock*, *Cro. Car.* 115. But a different rule was afterwards settled upon even in such cases. *Lee v. Rogers*, 1 *Lev.* 110; *Gould v. Johnson*, 2 *Salk.* 422, 2 *Ld. Raym.* 838; *Hawkings v. Billhead*, *Cro. Car.* 464; *Puckle v. Moor*, 1 *Vent.* 191.

⁷⁶ *Byles, Bills*, 363; *Chit. Bills*, 685; *Josselyn v. Lacier*, 10 *Mod.* 294.

⁷⁷ This being insufficient, if the contract is still executory. *Gould v. Johnson*, 2 *Salk.* 422, 2 *Ld. Raym.* 838.

⁷⁸ *Chapple v. Durston*, 1 *Crompt. & J.* 1.

⁷⁹ *Byles, Bills*, 363; *Chit. Bills*, 697; *Gale v. Capern*, 1 *Adol. & E.* 102, 3 *Nev. & M.* 863.

⁸⁰ *Benj. Chalm. Dig. art.* 252; 2 *Daniel, Neg. Inst.* 245; *Story, Bills*, § 160. *Bank of U. S. v. Donnally*, 8 *Pet.* 361; *Murray v. Fisher*, 5 *Lans. (N. Y.)* 98; *Darling v. Hitchcock*, 28 *U. C. Q. B.* 469, 25 *U. C. Q. B.* 463; *Hervey v. Pridham*, 11 *U. C. C. P.* 329. And see § 54, *supra*. Although the instrument would be barred by the statute of limitations where it was made payable. *Sawyer v. Macaulay*, 18 *S. C.* 543. But see, *contra*, if it could have been sued and was already barred in the place where it was made. *Hervey v. Jacques*, 20 *U. C. Q. B.* 366. In MAINE, effect is given to foreign statutes of

sued and compelled to pay a judgment in New Hampshire, although he would have been relieved by the statute in Vermont, he may bring an action in Vermont against his co-surety for contribution.⁸¹ But, where judgment has been recovered in Illinois on a note barred by the statute in Wisconsin, it has been held that a court of equity in Wisconsin will enjoin its collection there.⁸²

In general, a foreign statute of limitations is no defense.⁸³ If the maker leaves the state where the note is made and payable, before it becomes barred there, it has been held that it can still be sued on in another state, if not barred by its statute.⁸⁴ But the courts of Upper Canada have recognized and enforced the statute of limitations of Lower Canada in the case of a note made and payable there between parties who resided in Upper Canada, but who met in Lower Canada after its maturity, and could have sued and been sued there.⁸⁵

The statute, being one that relates to the remedy, may be changed even as to existing contracts, provided the remedy is not thereby at once destroyed.⁸⁶ And the time for bringing suit on a note may be extended by the statute, after it has become due,⁸⁷ or even after it is barred.⁸⁸ But such statutes are not retrospective, unless expressly

limitation in favor of residents of the foreign state. Laws 1885, c. 376. But this does not apply to bar a creditor residing in Maine. *MacNichol v. Spence*, 83 Me. 87, 21 Atl. 748.

⁸¹ *Aldrich v. Aldrich*, 56 Vt. 324.

⁸² *Brown v. Parker*, 28 Wis. 21.

⁸³ *Carpentier v. Minturn*, 6 Lans. (N. Y.) 56. Although both parties were residents of such foreign state, while the statute was running. *Crocker v. Arey*, 3 R. I. 178. In England the courts will not enforce a foreign statute, unless it affects the right of action itself. *Huber v. Steiner*, 2 Bing. N. C. 202, 2 Scott, 304; *Harris v. Quine*, L. R. 4 Q. B. 653.

⁸⁴ *Adams v. Kelly*, 20 Cent. Law J. 299. But see § 1612, *infra*.

⁸⁵ Although the note was subsequently transferred to a nonresident. *Sheriff v. Holcombe*, 13 U. C. C. P. 590, 2 U. C. Err. & App. 516.

⁸⁶ *Biscoe v. Anketell*, 28 Miss. 361; *West Feliciana R. Co. v. Stockett*, 13 Smedes & M. (Miss.) 395. Although it reduces the time to a few months. *George v. Gardner*, 49 Ga. 441. But it is unconstitutional where a reasonable time is not allowed on existing contracts. *Carr v. Robinson*, 8 Bush (Ky.) 269.

⁸⁷ *Bennett v. Bevard*, 6 Iowa, 82.

⁸⁸ *Maltby v. Cooper*, *Morris* (Iowa) 59; *McKinney v. Springer*, 8 Blackf. (Ind.) 506.

made so by their terms.⁸⁹ And a statute passed between the making of a note and the time it becomes due will not affect it.⁹⁰

American and Foreign Statutes.

§ 1595. The time for bringing suit upon a bill or note is variously fixed by statute in different countries and in the different states,—at two,⁹¹ three,⁹² four,⁹³ five,⁹⁴ six,⁹⁵ ten,⁹⁶ or fifteen years.⁹⁷ On

⁸⁹ Byles, Bills, 360; Jackson v. Woolley, 27 Law J. Q. B. 448; Fenwick v. Phillips, 3 Metc. (Ky.) '87; and, if the former statute is repealed without a saving clause, the new statute would run de novo on a note which the former statute had almost barred. Forsyth v. Ripley, 2 G. Greene (Iowa) 181.

⁹⁰ Means v. Harrison, 114 Ill. 248, 2 N. E. 64. But see Black v. Swanson, 49 Ga. 424, where the statute included debts "accruing" at a date which fell between the making and the maturity of the note.

⁹¹ ARGENTINE REPUBLIC (Code Com. art. 844); BRAZIL (Code Com. art. 382); URUGUAY (Code Com. art. 862); HUNGARY (Exch. Law, § 204).

⁹² MARYLAND (Pub. Gen. Laws, art. 57, § 1); NORTH CAROLINA (Code, § 155); AUSTRIA (Exch. Law, arts. 77, 100); GERMANY (Exch. Law, arts. 77, 100); SWEDEN (Exch. Law, § 76). So, in SWITZERLAND (Oblig. R. 803-805), as against the acceptor, the time being much shorter as against drawer and indorsers.

⁹³ CALIFORNIA (Code Civ. Proc. § 337); TEXAS (Rev. St. art. 3205). So, on bills of exchange reckoning from maturity, CHILI (Code Com. art. 761); COLOMBIA (Code Com. art. 511); COSTA RICA (Code Com. art. 504); ECUADOR (Code Com., as in "Spain"); PERU (Code Com. art. 516); SALVADOR (Code Com. art. 529); SPAIN (Code Com. art. 557); or from date of protest, MEXICO (Code Com. art. 467); or from date of payment by indorser, CHILI (Code Com. arts. 761-763).

⁹⁴ ARIZONA (Laws 1891, p. 74); ARKANSAS (Sand. & H. Dig. § 4827); FLORIDA (Rev. St. § 1294); KANSAS (Gen. St. c. 95, § 12); KENTUCKY (Ky. St. § 2515), the statute not applying to a note in the hands of the original payee, Caldwell v. Evans, 5 Bush (Ky.) 380; LOUISIANA (Rev. Civ. Code, art. 3540); NEBRASKA (Comp. St. § 5600); VIRGINIA (Code, § 2920). So, on bills reckoning from date of protest, in DENMARK (Exch. Law, § 73); or of last legal demand, BELGIUM (Code Nap.); FRANCE (Code Com. art. 189); GREECE (Code Nap.); HAYTI (Code Nap. § 186); ITALY (Code Com. art. 282); SAN DOMINGO (Code Nap.); TURKEY (Code Nap. § 146); VENEZUELA (Code Com. art. 90). So, between drawer and acceptor who pays without funds, or refuses payment with funds, in CHILI (Code

⁹⁵ See note 95 on following page.

⁹⁶ See note 96 on following page.

⁹⁷ See note 97 on following page.

the continent of Europe the action is generally of a summary character, and must be brought within a short time after protest. In Great Britain the act provides for summary proceedings on bills within six months after maturity.⁹⁸

Exceptions for Nonsuit, etc.

§ 1596. Many statutes provide for an extension of time, where judgment (in an action brought within due time) has been reversed or arrested, or judgment of nonsuit entered.⁹⁹ So, in case of reversal or arrest,¹⁰⁰ or reversal,¹⁰¹ or nonsuit, dismissal, or discontinuance

Com. arts. 763, 764). So, as against drawer and indorser, if the acceptor had funds. In PORTUGAL (Code Com. art. 423), the time being extended in other cases to 30 years.

⁹⁸ ALABAMA (Code, § 2615); COLORADO (Mills' Ann. St. § 2900); CONNECTICUT (Gen. St. § 1371); DELAWARE (Rev. Code, c. 123, § 8); GEORGIA (Civ. Code, § 3767); MAINE (Supp. Rev. St. c. 81, § 82); MASSACHUSETTS (Pub. St. c. 197, § 1); MICHIGAN (How. Ann. St. § 8713); MINNESOTA (Gen. St. § 5136); MISSISSIPPI (Ann. Code, § 2737); NEVADA (Gen. St. § 3644); NEW HAMPSHIRE (Pub. St. c. 217, § 3); NEW JERSEY (2 Gen. St. p. 1974, § 8); NEW MEXICO (Comp. Laws, § 1862); NEW YORK (Code Civ. Proc. § 382); OREGON (Code Civ. Proc. § 6); PENNSYLVANIA (Dig. p. 1213, § 19); RHODE ISLAND (Gen. Laws, c. 234, § 3); SOUTH CAROLINA (Code Civ. Proc. § 112); TENNESSEE (Shannon's Code, § 4472); VERMONT (V. S. § 1199); WISCONSIN (Sanb. & B. Ann. St. § 4222). So, in GREAT BRITAIN, by 21 Jac. I., c. 16.

⁹⁹ ILLINOIS (Hurd's Rev. St. c. 83, § 16); INDIANA (Horner's Rev. St. § 293); IOWA (Code, § 3447); MISSOURI (Rev. St. § 6774); WEST VIRGINIA (Code, c. 104, § 6). So, in HOLLAND (Exch. Law, art. 207).

¹⁰⁰ OHIO (2 Bates' Ann. St. § 4980).

¹⁰¹ 18 & 19 Vict. c. 67.

¹⁰² One year in ARKANSAS (Sand. & H. Dig. § 4841); ILLINOIS (Hurd's Rev. St. c. 83, § 25); MISSOURI (Rev. St. § 6784); NORTH CAROLINA (Code, § 166).

¹⁰³ ALABAMA (Code, § 2806); COLORADO (Mills' Ann. St. § 2917); CONNECTICUT (Gen. St. § 1386; but where suit is against executor or administrator, six months); DELAWARE (Rev. Code, c. 123, § 15); FLORIDA

¹⁰⁴ Six months in MAINE (Rev. St. c. 81, § 91); one year in CALIFORNIA (Code Civ. Proc. § 355); KANSAS (Gen. St. c. 95, § 17); NEVADA (Gen. St. § 3655); NEW HAMPSHIRE (Pub. St. c. 217, § 9); OHIO (Bates' Ann. St. § 4991); OREGON (Code Civ. Proc. § 6); SOUTH CAROLINA (Code Civ. Proc. § 125); WISCONSIN (Sanb. & B. Ann. St. § 4235).

only,¹⁰² or dismissal of the original action for want of jurisdiction.¹⁰³ So, in case of the unavoidable abatement of the original action for any cause,¹⁰⁴ or of abatement by the death of a party.¹⁰⁵ So, where an injunction has been granted, or any statutory prohibition prevents the action, the running of such injunction or prohibition will not be included as part of the time limited.¹⁰⁶ And the appointment of a receiver for an insolvent corporation has a like effect.¹⁰⁷

Most statutes of limitations recognize and except the natural dis-

(Rev. St. § 1284, reversal only); MASSACHUSETTS (Pub. St. c. 197, § 13); MICHIGAN (2 How. Ann. St. § 8723); MINNESOTA (Gen. St. § 5155); MISSISSIPPI (Ann. Code, § 2756); NEW JERSEY (2 Gen. St. p. 1978, § 26); NEW YORK (Code Civ. Proc. § 405); PENNSYLVANIA (Dig. p. 1215, § 21); RHODE ISLAND (Gen. Laws, c. 234, § 9); TENNESSEE (Shannon's Code, § 4446); VERMONT (V. S. § 1214); VIRGINIA (Code, § 2934); WEST VIRGINIA (Code, c. 104, § 19).

¹⁰² Six months in GEORGIA (Civ. Code, § 3786).

¹⁰³ Three months in KENTUCKY (Ky. St. § 2545).

¹⁰⁴ Six months in IOWA (Code, § 3455); MAINE (Rev. St. c. 81, § 91). So, in CONNECTICUT (Gen. St. § 1386), if against an executor or administrator, and otherwise for one year. So, for one year in COLORADO (Mills' Ann. St. § 2917); DELAWARE (Rev. St. c. 123, § 15); KANSAS (Gen. St. c. 95, § 17); MASSACHUSETTS (Pub. St. c. 197, § 13); MICHIGAN (How. Ann. St. § 8723); MISSISSIPPI (Ann. Code, § 2756); OHIO (2 Bates' Ann. St. § 4991); RHODE ISLAND (Gen. Laws, c. 234, § 9); VERMONT (V. S. § 1214); VIRGINIA (Code, § 2934); WEST VIRGINIA (Code, c. 104, § 19). So, for five years in INDIANA (Horner's Rev. St. § 299). And the dismissal of an action because of an accidental omission of the clerk to enter it seasonably on the docket is within the Massachusetts statute. *Allen v. Sawtelle*, 7 Gray, 165.

¹⁰⁵ One year in ARKANSAS (Sand. & H. Dig. §§ 4842, 4843); MASSACHUSETTS (Pub. St. c. 197, § 13); MISSOURI (Rev. St. §§ 6785, 6786); MISSISSIPPI (Ann. Code, § 2756); in CONNECTICUT (Gen. St. § 1386), except where suit originally brought against executor or administrator, six months.

¹⁰⁶ ALABAMA (Code, § 2635); ARKANSAS (Sand. & H. Dig. § 4844); CALIFORNIA (Code Civ. Proc. § 356); ILLINOIS (Hurd's Rev. St. c. 83, § 23); IOWA (Code, § 3458); KENTUCKY (Ky. St. § 2544); MINNESOTA (Gen. St. § 5151); MISSISSIPPI (Ann. Code, § 2758a); MISSOURI (Rev. St. § 6787); NEVADA (Gen. St. § 3656); NEW YORK (Code Civ. Proc. § 406); NORTH CAROLINA (Code, § 167); OREGON (Code Civ. Proc. § 20); SOUTH CAROLINA (Code Civ. Proc. § 126); TENNESSEE (Shannon's Code, § 4447); VERMONT (V. S. § 1212); WISCONSIN (Sanb. & B. Ann. St. § 4236).

¹⁰⁷ *Ludington v. Thompson*, 4 App. Div. 117, 38 N. Y. Supp. 768.

abilities which prevent the bringing of suit; and many statutes provide that, where several causes of disability concur, all must cease before the statute will begin to run.¹⁰⁸ It is also provided in some states that the action is barred if the cause of action arose, and is barred, in another state.¹⁰⁹ In Nevada the statute makes a distinction between liabilities accrued out of the state and those which accrue in the state, limiting the former to two years or less, according to the time when they became due.¹¹⁰ A similar statute in Colorado has been construed not to apply to a note given in Colorado for a debt which had accrued in Wyoming, notwithstanding a promise made in Wyoming to pay it.¹¹¹ There was formerly a similar statute in Illinois also, which no longer exists.¹¹²

It is provided in some states that, where an action is brought on the ground of a fraud which has been concealed from the plaintiff's knowledge, action may be brought within six years after discovery

¹⁰⁸ ALABAMA (Code, § 2637); KENTUCKY (Ky. St. § 2538); MINNESOTA (Gen. St. § 5153); MISSOURI (Rev. St. § 6790); NEVADA (Gen. St. § 3658); NEW YORK (Code Civ. Proc. § 409); NORTH CAROLINA (Code, § 175); OREGON (Code Civ. Proc. § 23); SOUTH CAROLINA (Code Civ. Proc. § 128); TENNESSEE (Shannon's Code, § 4450); WISCONSIN (Sanb. & B. Ann. St. § 4238). But, when the statute once begins to run, no subsequent disability will afterwards interrupt its running. Benj. Chalm. Dig. art. 253; 2 Pars. Notes & B. 646.

¹⁰⁹ ALABAMA (Code, § 2625); CALIFORNIA (Code Civ. Proc. § 361), unless held by a citizen of California from its maturity; ILLINOIS (Hurd's Rev. St. c. 83, § 20); INDIANA (Horner's Rev. St. § 297); IOWA (Code, § 3452); KANSAS (Gen. St. c. 95, § 16); KENTUCKY (Ky. St. § 2542); MASSACHUSETTS (Pub. St. c. 197, § 11); MINNESOTA (Gen. St. § 5146); MISSISSIPPI (Ann. Code, § 2754); NEBRASKA (Comp. St. §§ 5608, 5611); NEVADA (Gen. St. § 3662); NEW YORK (Code Civ. Proc. § 390), unless held by a citizen of New York from its maturity; OHIO (Bates' Ann. St. § 4900); OREGON (Code Civ. Proc. § 26); TENNESSEE (Shannon's Code, § 4480), if party to be charged was a resident of such foreign state when the right of action accrued; TEXAS (Rev. St. § 3374, as to immigrants); VIRGINIA (Code § 2933); WEST VIRGINIA (Code, c. 104, § 18).

¹¹⁰ NEVADA (Gen. St. § 3661). But this limitation, which was formerly six months, was held not to apply to a note signed in another state, but delivered in Nevada, *Read v. Edwards*, 2 Nev. 262; although it applied to a note payable in Colorado or Nevada, *Wilcox v. Williams*, 5 Nev. 206.

¹¹¹ *Hawse v. Burgmire*, 4 Colo. 313.

¹¹² *Campbell v. Harris*, 30 Ill. 395.

of the fraud.¹¹³ But in Connecticut, when the maker of a negotiable note gives the holder notice in writing that it was obtained from him by conspiracy or fraud, action must be brought within six months after it is due, or within one year after notice.¹¹⁴

Duebills and Certificates—Bank Notes—Coupons.

§ 1597. The statute of limitations applies, in general, to all simple contracts, whether negotiable or not. Thus, it will run against a duebill from its date.¹¹⁵ And such bill is held in Louisiana to be a promissory note, within the meaning of the statute.¹¹⁶ But in Connecticut, although a promise of payment is implied by law, a duebill is held not to be a nonnegotiable note, within the meaning of the statute.¹¹⁷

The statute of limitations also affects certificates of deposit; but it runs against such certificate only from demand of payment.¹¹⁸ In Wisconsin, however, certificates of deposit are held to be in effect negotiable demand notes, and the statute runs from the time of issue without demand.¹¹⁹

In general, a bank bill, being intended for indefinite circulation, is not subject to the statute of limitations either against the first or subsequent holders.¹²⁰ But, when bank notes are no longer in circula-

¹¹³ MASSACHUSETTS (Pub. St. c. 197, § 14); MISSISSIPPI (Ann. Code. § 2749). So, in NEW YORK (Code Civ. Proc. § 382). And see § 1591, supra.

¹¹⁴ CONNECTICUT (Gen. St. § 1373).

¹¹⁵ *Guignard v. Parr*, 4 Rich. Law (S. C.) 184; *Barnes v. Garvey*, 4 Kan. 555.

¹¹⁶ *Wardell v. Sterne*, 22 La. Ann. 28, overruling *Garland v. Scott*, 15 La. Ann. 143. So, a duebill payable in current funds subject to draft at 60 days. *Spearing v. Succession of Zacharie*, 26 La. Ann. 496. Or a written request to pay "as part payment of a note I hold against you." *Robichaud v. Thorne*, 21 La. Ann. 611. So, a receipt for a certain amount, "to be paid when called upon." *Baylis v. Nash*, 28 La. Ann. 590.

¹¹⁷ *Currier v. Lockwood*, 40 Conn. 349.

¹¹⁸ *Howell v. Adams*, 68 N. Y. 314. So, where the certificate is payable with interest, *Payne v. Gardiner*, 29 N. Y. 146; or from maturity if payable on a given day, *Baker v. Leland*, 9 App. Div. 365, 41 N. Y. Supp. 399; or from date, if payable "on return of this certificate," *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705.

¹¹⁹ *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705.

¹²⁰ 2 Daniel, Neg. Inst. 691; 2 Pars. Notes & B. 643. And this is provided (2278)

tion and reissued, they are liable to be barred by the statute like other notes.¹²¹

An interest coupon is, in like manner, barred by the statute; but coupons attached to a bond will not be barred until the statute has run against the bond.¹²² If, however, they have been detached and negotiated separately, the statute will run against them from their maturity, and not from that of the bond.¹²³

Limitation of Checks—Sealed Notes.

§ 1598. The statute runs against a check on a bank from the time payment is demanded.¹²⁴ But where a check was not presented for ten years, and the drawer had no funds in bank at the time of giving the check, or for more than six years afterwards, it was held that the amount became due immediately from the drawer without presentment of the check, and that an action against him on the check was therefore barred within six years from its date.¹²⁵ The right of action upon a certified check is subject, in like manner, to the bar of the

by statute in ALABAMA (Code, § 2639), except as to a bank in liquidation two years from notice; ARKANSAS (Sand. & H. Dig. § 4839); CALIFORNIA (Code Civ. Proc. § 348); MAINE (Rev. St. c. 81, § 86); MASSACHUSETTS (Pub. St. c. 197, § 6); MICHIGAN (How. Ann. St. § 8716); MISSISSIPPI (Ann. Code, § 2758); MISSOURI (Rev. St. § 6792); NEW YORK (Code Civ. Proc. § 393); NORTH CAROLINA (Code, § 174); SOUTH CAROLINA (Code Civ. Proc. § 129); TENNESSEE (Shannon's Code, § 4476); VERMONT (V. S. § 1202); WISCONSIN (Sanb. & B. Ann. St. § 4230). So, in New Hampshire, as to an action against stockholders. *Bullard v. Bell*, 1 Mason, 243, Fed. Cas. No. 2,121. And the date is no evidence of the time of issue. *Dougherty v. Bank*, 13 Ga. 287; *Long v. Bank*, 81 N. C. 41. And the statute would run, not from the date, but from the reissue of the note, *Greer v. Perkins*, 5 Humph. (Tenn.) 588; or from demand and refusal, *Farmers' & M. Bank v. White*, 2 Sneed (Tenn.) 482.

¹²¹ *Johnston v. Talley*, 60 Ga. 540; *Kimbrow v. Bank*, 49 Ga. 419.

¹²² *City of Lexington v. Butler*, 14 Wall. 282; *Meyer v. Porter*, 65 Cal. 67, 2 Pac. 884; *Philadelphia Trust, Safe-Deposit & Insurance Co. v. Philadelphia & E. R. Co.*, 160 Pa. St. 590, 28 Atl. 960.

¹²³ *Clark v. Iowa City*, 20 Wall. 583.

¹²⁴ *Cowing v. Altman*, 71 N. Y. 435; *Viets v. Bank*, 101 N. Y. 563, 5 N. E. 457, affirming 31 Hun, 484. They are included in the statutory limitation for bills of exchange. *Rogers v. Durant*, 140 U. S. 208, 11 Sup. Ct. 754.

¹²⁵ *Brush v. Barrett*, 82 N. Y. 400, affirming 16 Hun, 409.

statute.¹²⁶ But, where a loan has been made by means of the lender's check, the statute will run against an action for the loan, not from the date of the check, but from the date of obtaining the money on it.¹²⁷

In many states a distinction is still made between notes or other instruments under seal and unsealed notes, as to time for bringing action.¹²⁸ In Connecticut, contracts under seal and nonnegotiable notes may be sued upon at any time within seventeen years, or within four years after the end of any personal disability of the holder.¹²⁹ In Arkansas, action on a sealed note must be brought within ten years, the limitation as to others being five years.¹³⁰ In Georgia the statute runs for twenty years upon a sealed note.¹³¹ But a note does not become a sealed instrument, as to the statute of limitations, by reason of a collateral warrant under seal to confess judgment given at the same time.¹³²

Limitation of Attested Notes.

§ 1599. In several of the New England states a longer period is allowed for bringing an action on notes signed by an attesting witness.¹³³ In Maine it has been held that the lapse of the statutory

¹²⁶ See § 646, *supra*. But see *Girard Bank v. Bank of Penn Tp.*, 39 Pa. St. 92.

¹²⁷ *Garden v. Bruce*, L. R. 3 C. P. 300. Or from the time when the payee learned that there were no funds to meet it. *Bethell v. Bethell*, 34 Ch. Div. 561.

¹²⁸ So, *Garner v. Toney*, 107 Ala. 352, 18 South. 161.

¹²⁹ CONNECTICUT (Gen. St. § 1370). But not so a guaranty indorsed on a nonnegotiable note. *Carpenter v. Thompson*, 66 Conn. 457, 34 Atl. 105.

¹³⁰ *Dyer v. Gill*, 32 Ark. 410; *Foster v. Jett*, 20 C. C. A. 670, 74 Fed. 678. But see § 71, *supra*.

¹³¹ *Bonner v. Metcalf*, 58 Ga. 236. But the note must not only have a seal, but recite that it is sealed, *Chambers v. Kingsberry*, 68 Ga. 328; *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. 174; while in MISSISSIPPI the recital in the note is enough, although no seal is put on for several days, *McCarley v. Board*, 58 Miss. 483.

¹³² *Walrod v. Manson*, 23 Wis. 393.

¹³³ VERMONT, 14 years; MAINE and MASSACHUSETTS, 20 years. But this did not extend to an unwitnessed indorsement. *Seavey v. Coffin*, 64 Me. 224. And see § 68, *supra*.

twenty years in such case is a conclusive bar, and not a mere presumption.¹³⁴ And, under the present statute, an action may be brought for money had and received on an attested note during the whole time in which an action would lie on the note itself.¹³⁵ The Massachusetts statute has been held to cover an attested order for the payment of money,¹³⁶ but not a nonnegotiable note.¹³⁷ An action may be brought in Massachusetts by the indorsee of an attested note in the name of the payee after the lapse of six years, and within the statutory twenty years.¹³⁸ And the assignee of an insolvent payee has the benefit of the enlarged limitation.¹³⁹ The Maine statute has been held not to apply to notes payable in work;¹⁴⁰ or to a note for "\$200, and such other sums as may arise as additional premium";¹⁴¹ or to an attested promise to pay a note;¹⁴² or to a note in which the promise to pay is conditional.¹⁴³ So, a memorandum as to payment of interest, attested by a witness at the foot of a note and to the left of the maker's signature, will not make it an attested note.¹⁴⁴ And although the maker signs a note with the printed word "Witness" upon it in presence of an attorney, who intends to sign it as a witness, but does not sign it until afterwards, and then signs it without the

¹³⁴ *Pulsifer v. Pulsifer*, 66 Me. 442. But the presumption might formerly be rebutted by a new promise or acknowledgment. *Howe v. Saunders*, 38 Me. 350.

¹³⁵ *Merrill v. Merrill*, 63 Me. 78. In KENTUCKY, a note, being an express promise, was a specialty, but not so an indorsement or a bill of exchange. *Clark v. Schwing*, 1 Dana, 333.

¹³⁶ *Almy v. Winslow*, 126 Mass. 342.

¹³⁷ *Sibley v. Phelps*, 6 Cush. (Mass.) 172; *Moore v. Edwards*, 167 Mass. 74, 44 N. E. 1070.

¹³⁸ *Rockwood v. Brown*, 1 Gray (Mass.) 261. And although the indorsement was more than six years after the maturity of the note. *Stanley v. Kempton*, 30 Me. 118. But see, contra, in MASSACHUSETTS, *Frye v. Barker*, 4 Pick. 382. And a holder by delivery without indorsement from the payee is not within the statute. *Houghton v. Mann*, 13 Metc. 128.

¹³⁹ *Pitts v. Holmes*, 10 Cush. (Mass.) 92.

¹⁴⁰ *Dennett v. Goodwin*, 32 Me. 44.

¹⁴¹ *Lime Rock Ins. Co. v. Hewett*, 60 Me. 407.

¹⁴² *Young v. Weston*, 39 Me. 492; *Bunker v. Ireland*, 81 Me. 519, 17 Atl. 706.

¹⁴³ *Chapman v. Wight*, 79 Me. 595, 12 Atl. 546.

¹⁴⁴ *Trustees of Parsonage Fund in Fryeburg v. Osgood*, 21 Me. 176.

consent or knowledge of the maker, and not in his presence, it will not be an attested note.¹⁴⁵

Limitation of Collateral Security.

§ 1600. A collateral lien may be enforced where an action for the debt would be barred.¹⁴⁶ Thus, a note may be barred, and not the mortgage which secures it.¹⁴⁷ The debt represented by the note remains in such case with the mortgage, although the statute has discharged the remedy on the note,¹⁴⁸ and although the mortgage was indorsed with a promise "to pay on the same condition as the within as per note of this date."¹⁴⁹ So, an action will lie on a covenant to pay contained in a collateral mortgage, after the note secured by it is barred.¹⁵⁰

In New Hampshire the statute puts a note secured by mortgage on the same footing as to the statute of limitations as the mortgage itself, and the note is not barred until the mortgage is barred.¹⁵¹ On the other hand, in Illinois and some other states the mortgage is treated as a mere incident of the note, and is put on the same footing and barred when the note is barred.¹⁵² And, if the note is taken out

¹⁴⁵ *Smith v. Dunham*, 8 Pick. (Mass.) 246.

¹⁴⁶ *Byles, Bills*, 345; *Spears v. Hartly*, 3 Esp. 81.

¹⁴⁷ *Cerney v. Pawlot*, 66 Wis. 202, 28 N. W. 183; *Hayes v. Frey*, 54 Wis. 503, 11 N. W. 695; *Fisher's Ex'rs v. Mossman*, 11 Ohio St. 42; *Myer v. Beal*, 5 Or. 130; *Wilkinson v. Flowers*, 37 Miss. 579; *Cheney v. Stone*, 29 Fed. 885; *Demuth v. Bank*, 85 Md. 315, 37 Atl. 266; *Webber v. Ryan*, 54 Mich. 70, 19 N. W. 751.

¹⁴⁸ *Thayer v. Mann*, 19 Pick. (Mass.) 535. Although the mortgage could not have become barred by the existing statute. *Joy v. Adams*, 26 Me. 330. But no action will lie after foreclosure for any deficiency that may remain on the note, *Belknap v. Gleason*, 11 Conn. 159; nor for a personal decree in the foreclosure, *Barnt v. Kennicutt*, 57 Mich. 268, 23 N. W. 808.

¹⁴⁹ *Grinnell v. Baxter*, 17 Pick. (Mass.) 386.

¹⁵⁰ *Earnshaw v. Stewart*, 64 Md. 513, 2 Atl. 734; *Dinniny v. Gavin*, 4 App. Div. 298, 39 N. Y. Supp. 485.

¹⁵¹ *Alexander v. Whipple*, 45 N. H. 502; *Gen. Laws*, p. 511, § 5; *Meredith Bridge Sav. Bank v. Ladd*, 40 N. H. 459. But the act only applies as against the mortgage, and will not affect a surety on the note who was not a party to the mortgage subsequently given by the father of the principal maker.

¹⁵² *Emory v. Keighan*, 94 Ill. 543; *Medley v. Elliott*, 62 Ill. 532; *Lord v. Morris*, 18 Cal. 482; *McCarthy v. White*, 21 Cal. 495; *Lent v. Shear*, 26 Cal.

of the ~~statute~~ by bringing suit upon it, it will save the mortgage also.¹⁵³ In Kentucky, where a note is secured by a vendor's lien, the lien goes with the note, and is barred by the same delay.¹⁵⁴

Limitation against the State—Decedents' Estates.

§ 1601. The statute of limitations does not, in general, affect the right of the state to bring suit at any time on a bill or note.¹⁵⁵ But this immunity does not belong to counties or other municipal corporations.¹⁵⁶

If the payee dies, the statute will run against his personal representatives only from the date of letters granted after the bill had matured.¹⁵⁷ And many statutes give additional time for suit by the executor or administrator of the person originally entitled,¹⁵⁸ the

351; *Wood v. Goodfellow*, 43 Cal. 185; *Schnucker v. Sibert*, 18 Kan. 104; *City of Fort Scott v. Schulenberg*, 22 Kan. 649; *Blackwell v. Barnett*, 32 Tex. 326. So, in Oregon, *Allen v. O'Donald*, 28 Fed. 17. If some of the secured notes are barred, and others are not, the mortgage can only be foreclosed as to the latter. *Grattan v. Wiggins*, 23 Cal. 16. And if a note is barred as to some makers, and not as to others, it can only be foreclosed against the latter. *Low v. Allen*, 26 Cal. 141.

¹⁵³ *Eborn v. Cannon's Adm'rs*, 32 Tex. 231.

¹⁵⁴ *Yeates v. Weeden*, 6 Bush, 438; *Tate v. Hawkins*, 81 Ky. 577.

¹⁵⁵ 2 Pars. Notes & B. 663; or against the commissioners of the sinking fund, *Hill v. Josselyn*, 13 Smedes & M. (Miss.) 507; or upon a note made to the clerk for property sold by order of the court, and therefore in the custody of the law, *Tyner v. Fenner*, 4 Lea (Tenn.) 469.

¹⁵⁶ *St. Charles Co. v. Powell*, 22 Mo. 525.

¹⁵⁷ *Byles, Bills*, 346; *Benj. Chalm. Dig.* art. 253; *Chit. Bills*, 685; *Murray v. East India Co.*, 5 Barn. & Ald. 204.

¹⁵⁸ Six months after death in ALABAMA (Code, § 2632); CALIFORNIA (Code Civ. Proc. § 353). One year after death in ARKANSAS (Sand. & H. Dig. § 4840); COLORADO (Mills' Ann. St. § 2916); CONNECTICUT (Gen. St. § 1248). One year after letters, ILLINOIS (Hurd's Rev. St. c. 83, § 19); MINNESOTA (Gen. St. § 5148); MISSISSIPPI (Ann. St. § 2753; *Blossinger v. Lawson*, 57 Miss. 36); NEVADA (Gen. St. § 3693); NEW YORK (Code Civ. Proc. § 402); NORTH CAROLINA (Code, § 164); OREGON (Code Civ. Proc. § 18); SOUTH CAROLINA (Code Civ. Proc. § 123); TEXAS (Rev. St. art. 3368). Unless executor or administrator sooner appointed, and in that case until then, WISCONSIN (Sanb. & B. Ann. St. § 4234). Six months after notice of appointment of representative in MAINE (Rev. St. c. 81, § 92). In RHODE ISLAND the statute applies if the plaintiff die within 60 days of the end of

effect of such a statute being to suspend the running of the statute of limitations until the letters are granted.¹⁵⁹

Many statutes provide also for an extension of time in case of the death of the party liable to be sued.¹⁶⁰ In Indiana, where the statute allowed eighteen months to bring suit after the maker's death, and the statutory time (Gen. Laws, c. 234, § 8); and in IOWA, if the plaintiff die within one year of the end of that time (Code, § 3454). One year after letters in KENTUCKY (Ky. St. §§ 2526, 2527); but not over four years after limitation. Eighteen months after death in INDIANA (Horner's Rev. St. § 298). Two years after death, if plaintiff's death occur before or within 30 days of the end of the period of limitation, MAINE (Rev. St. c. 81, § 92); MICHIGAN (How. Ann. St. § 8722). Two years after letters in MASSACHUSETTS (Pub. St. c. 197, § 12); VERMONT (V. S. § 1213); five years after death in VIRGINIA (Code, § 2932); WEST VIRGINIA (Code, c. 104, § 17), if interval of more than five years occurs between death and qualification of representative. Under the Massachusetts law, suit may be brought by the payee's representative within two years after letters, on the maker's estate, although more than two years after his own letters. *Converse v. Johnson*, 146 Mass. 20, 14 N. E. 925. But the converse is not true. *Hill v. Mixter*, 5 Allen, 27.

¹⁵⁹ *Cook v. Reynolds*, 58 Miss. 243.

¹⁶⁰ Six months: ALABAMA (Code, § 2632); CALIFORNIA (Code Civ. Proc. § 353); NEW JERSEY (2 Gen. St. p. 1976, § 16). One year: ILLINOIS (Hurd's Rev. St. c. 83, § 19); MINNESOTA (Gen. St. § 5148); MISSISSIPPI (Ann. Code, § 2753); NEVADA (Gen. St. § 3653); NORTH CAROLINA (Code, § 164); OREGON (Code Civ. Proc. § 18); TENNESSEE (Shannon's Code, § 4451); TEXAS (Rev. St. art. 3369); WISCONSIN (Sanb. & B. Ann. St. § 4234); RHODE ISLAND (Gen. Laws, c. 234, § 8), if death within 60 days of limitation. Two years: FLORIDA (Rev. St. § 1284). Until letters issued, in SOUTH CAROLINA (Code Civ. Proc. § 123). In KENTUCKY (Ky. St. § 2528), if there are no representatives, and the suit is against the heirs, two years are allowed; otherwise, the six months during which suit is stayed. *Davis' Adm'r v. Auxler* (Ky.) 41 S. W. 767. Eighteen months in INDIANA (Horner's Rev. St. § 298); NEW YORK (Code Civ. Proc. § 403). Two years, if defendant die within 30 days of the limitation period: MAINE (Rev. St. c. 81, § 92); MICHIGAN (How. Ann. St. § 8722). Two years after letters: MASSACHUSETTS (Pub. St. c. 197, § 12); VERMONT (V. S. § 1214). In GEORGIA all actions against executors must be brought within ten years after the right accrues (Civ. Code, § 3772), but the time between the death of the debtor and the taking out of administration and the time between two administrations, not exceeding in either case five years, is not included. But this applies only to the party entitled to sue, and only twelve months are allowed for nonadministration on the estate of the party liable. *Pendleton v. Andrews*, 70 Ga. 306. In CONNECTICUT six months are allowed for presen-

the general statute barred a promissory note in twenty years, it was held insufficient to reply to a plea of the statute of limitations that the maker died within twenty years, without averring also that the suit was brought within the statutory period of extension.¹⁶¹ But where a statute, as in Illinois, requires the holder to proceed within two years after the death of the principal debtor by filing his claim against his estate or by bringing suit against the surety, he may proceed within the time by action against the surety, without also filing his claim against the estate of the principal.¹⁶²

At common law, if the debtor dies before action brought, and no executor is appointed, his death will not stop the running of the statute.¹⁶³ And the statute will, in general, apply only to an executor appointed after its passage,¹⁶⁴ and to cases where the maker dies before the note is barred.¹⁶⁵ Under the New York statute, providing for suit within eighteen months after the maker's death, such action may be brought on a demand note more than six years after its date, if the maker has died within the six years, and the suit is brought within the statutory period afterwards.¹⁶⁶ And if the debtor resided out of the state until the action accrued and until his death, it has been held that the statute will run only from the time when letters of administration are granted within the state.¹⁶⁷ But where the action against the maker's administrator is barred, and the indorser afterwards pays

tation of claim, and four months after refusal for suit. *Continental Life Ins. Co. v. Barber*, 50 Conn. 569.

¹⁶¹ *Hiatt v. Hough*, 11 Ind. 161.

¹⁶² Rev. St. c. 132, § 3; *Grindol v. Ruby*, 14 Ill. App. 439.

¹⁶³ *Byles*, Bills, 349; *Chit. Bills*, 685; *Rhodes v. Smethurst*, 4 Mees. & W. 42, affirmed in 6 Mees. & W. 351.

¹⁶⁴ *West Feliciana R. Co. v. Stockett*, 13 Smedes & M. (Miss.) 395. But the statute does not apply to a note maturing after the maker's death. *Sivley v. Summers*, 57 Miss. 712.

¹⁶⁵ *Boyce v. Francis*, 56 Miss. 573.

¹⁶⁶ *Wenman v. Insurance Co.*, 13 Wend. 268. But a clause making it payable, in case of the maker's death, out of a particular fund, or out of his estate, will not postpone the statute of limitations. *In re Long*, 2 N. Y. St. Rep. 197.

¹⁶⁷ *Davis v. Garr*, 6 N. Y. 124. But in Illinois the statute begins to run from his death in another state, *Hibernia Banking Ass'n v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919.

a renewal given by the administrator, he cannot bring an action even in equity against the maker's estate.¹⁶⁸

Disabilities Excepted.

§ 1602. The statute of James I. and most of the American statutes of limitation do not run against a holder during the personal disability of infancy, insanity, or coverture (where that is still a disability).¹⁶⁹ But, after the statute has begun to run, the disability of a later holder will not suspend it.¹⁷⁰ And, when the disability that

¹⁶⁸ *White v. Thompson*, 79 Me. 207, 9 Atl. 118, 10 East. Rep. 836.

¹⁶⁹ *Benj. Chalm. Dig.* art. 253; 2 *Edw. Bills & N.* § 961; 2 *Pars. Notes & B.* 633; *Scarpellini v. Atcheson*, 7 Q. B. 864. Action may be brought after disability, and within one year: IOWA (Code, § 3453); KANSAS (Gen. St. c. 95, § 13); MINNESOTA (Gen. St. § 5147); NEW YORK (Code Civ. Proc. § 396); OREGON (Code Civ. Proc. § 17); SOUTH CAROLINA (Code Civ. Proc. § 122); WISCONSIN (Sanb. & B. Ann. St. § 4233). And in MISSOURI the representatives of persons dying under disability have one year in which to sue (Rev. St. § 6780). Two years: ILLINOIS (Hurd's Rev. St. c. 83, § 21); INDIANA (Horner's Rev. St. § 296); NEW HAMPSHIRE (Pub. St. c. 217, § 7). Three years: DELAWARE (Rev. Code, c. 123, § 13); MARYLAND (Pub. Gen. Laws, art. 57, § 2); NORTH CAROLINA (Code, § 163); TENNESSEE (Shannon's Code, § 4448). But not beyond twenty years in all. ALABAMA (Code, § 2624). Four years: CALIFORNIA (Code Civ. Proc. § 352); TEXAS (Rev. St. art. 3373). Five years: ARKANSAS (Sand. & H. Dig. § 4833); KENTUCKY (Ky. St. § 2525); MAINE (Rev. St. c. 81, § 88); MINNESOTA, except in case of infancy (Gen. St. § 5147); NEBRASKA (Comp. St. § 5607); SOUTH CAROLINA, except in case of infancy (Code Civ. Proc. § 122); VIRGINIA, but not beyond twenty years from time right of action accrued (Code, § 2931). Six years: COLORADO (Mills' Ann. St. § 2915); GEORGIA (Civ. Code, § 3779); MASSACHUSETTS (Pub. St. c. 197, § 9); MICHIGAN (How. Ann. St. § 8718); MISSISSIPPI (Ann. Code, § 2146), but unsoundness of mind does not extend time more than twenty-one years; NEVADA (Gen. St. § 3652); NEW JERSEY (2 Gen. St. p. 1975, § 11); PENNSYLVANIA (Dig. p. 1215, § 22); RHODE ISLAND (Gen. Laws, c. 234, § 6); VERMONT (V. S. § 1200). Ten years: MISSOURI (Rev. St. § 6779); WEST VIRGINIA (Code, c. 104, § 16). Fifteen years: OHIO (Bates' Ann. St. § 4986).

¹⁷⁰ *Causey v. Snow* (N. C.) 20 S. E. 359. On the other hand, there may be concurrent causes for suspension before it begins to run; e. g. on a note by husband to wife, existing coverture. *Biggerstaff's Adm'r v. Biggerstaff's Adm'r* (Ky.) 40 S. W. 671; *Morrison v. Brown*, 84 Me. 82, 24 Atl. 672; and, after coverture ended by death, the further statutory extension on death of party liable. *Id.*

stayed the statute is once removed, the statute begins to run, and is not stayed by any fresh disability.¹⁷¹ In Mississippi, a married woman's note given for the purchase of land is barred as a note, and not as an "express trust" (on which the statute allows a longer time).¹⁷² So, where one borrows a ward's money from his guardian, and gives a note to the guardian, he is a debtor, and not a trustee, and is protected by the limitation as to ordinary debts.¹⁷³ On the other hand, an infant, who is protected by the disability clause of the statute, may sue as a distributee of his ancestor's estate, and will not be barred by the previous negligence of the administrator.¹⁷⁴

Joint Obligations—Principal and Surety.

§ 1603. Where several parties are jointly bound, process served upon one will stop the running of the statute as to all.¹⁷⁵ And, if judgment is rendered against several partners as makers or acceptors, an action cannot be maintained against another and secret partner subsequently discovered after the statute has run out.¹⁷⁶ But if an action is begun against two joint makers, and one is relieved by the statute, judgment may be entered against the other who remains liable.¹⁷⁷ If two of three joint makers are discharged by the statute, and the third (who is not discharged) pays the note, he may bring suit for contribution against the others.¹⁷⁸ And, conversely, where one who

¹⁷¹ Byles, Bills, 352; 2 Pars. Notes & B. 645; *Durore v. Jones*, 4 Term R. 310; *Smith v. Hill*, 1 Wills. 134; *Ruff's Adm'r v. Bull*, 7 Har. & J. (Md.) 14; *Amole's Adm'r's Appeal*, 115 Pa. St. 356, 8 Atl. 614.

¹⁷² *McNair v. Stanton*, 57 Miss. 298.

¹⁷³ *Wilson v. Sibley*, 54 Miss. 656. But the guardian may be barred, and not the infant ward. *Eckford v. Evans*, 56 Miss. 18.

¹⁷⁴ *Pittman v. McClellan*, 55 Miss. 299.

¹⁷⁵ *Rogers v. Gibbs*, 24 La. Ann. 467. But one of two several makers may plead the statute, although the other is liable by reason of a several judgment, *Britton v. Rush*, 31 La. Ann. 264; or other bar, *Pope v. Risley*, 23 Mo. 185.

¹⁷⁶ *Navassa Guano Co. v. Willard*, 73 N. C. 521.

¹⁷⁷ *Reading v. Beardsley*, 41 Mich. 123, 1 N. W. 965. So, a partnership note may be barred as to one maker, and not as to the other. *Hapgood v. Watson*, 65 Me. 510.

¹⁷⁸ *Boardman v. Paige*, 11 N. H. 431. This has been expressly provided against by statute in INDIANA (Horner's Rev. St. § 306).

has been discharged pays the note, he may sue the other who has not been discharged for contribution.¹⁷⁹

On the other hand, if the claim of one surety against the principal is barred, but he recovers in contribution against his co-surety, the latter is also barred as against the principal.¹⁸⁰

So, if an indorser pays a note after it is barred, he cannot recover against the maker.¹⁸¹ But an indorser may be held liable—e. g. by reason of payments of interest—although the maker is discharged.¹⁸² In general, however, a note barred as against the principal is barred as against the surety.¹⁸³

Limitations Reckoned from Maturity.

§ 1604. The statute begins to run against a party from the time when his action first accrued, although the action might have been fruitless at that time.¹⁸⁴ And it is reckoned up to the time when suit is begun. In determining such time, the law has respect to the actual commencement of the suit, and not to the time of filing an amended or supplementary petition.¹⁸⁵ The statute runs, in general, from the maturity of a bill, and not from its date.¹⁸⁶ But, if the bill is dishonored by nonacceptance, the statute will run from that time, and not from a subsequent refusal on presentment for payment.¹⁸⁷

¹⁷⁹ *McClatchie v. Durham*, 44 Mich. 435, 7 N. W. 76.

¹⁸⁰ *Stone v. Hammell*, 83 Cal. 549, 23 Pac. 703.

¹⁸¹ *Woodruff v. Moore*, 8 Barb. (N. Y.) 171.

¹⁸² *Union Nat. Bank v. Lee*, 33 La. Ann. 301.

¹⁸³ *Auchampaugh v. Schmidt*, 70 Iowa, 642, 27 N. W. 805.

¹⁸⁴ *Byles, Bills*, 346; 2 *Edw. Bills & N.* § 957; 2 *Pars. Notes & B.* 639; *Emery v. Day*, 1 *Cromp. M. & R.* 245, 4 *Tyrw.* 695. And where notice of dishonor is necessary before suit against the drawer or indorser, it would seem that the statute of limitations should begin to run from such notice. *Benj. Chalm. Dig. art. 252.*

¹⁸⁵ *Smith v. Kinney's Ex'rs*, 33 *Tex.* 283; *Killebrew v. Stockdale*, 51 *Tex.* 529. So, an action begun in due time by an administrator will inure to the benefit of an heir who is afterwards allowed to intervene. *Foote v. O'Rork*, 59 *Tex.* 215. But there seems to be no trace in the United States of the old English practice of continuing writs not actually issued, *Byles, Bills*, 348; or renewing writs once issued, under 15 & 16 *Vict. c. 76*; 2 *Wm. IV. c. 39.*

¹⁸⁶ *Byles, Bills*, 346; *Chit. Bills*, 684; 2 *Pars. Notes & B.* 642.

¹⁸⁷ *Byles, Bills*, 348; *Benj. Chalm. Dig. art. 252*; 2 *Pars. Notes & B.* 644; *Whitehead v. Walker*, 9 *Mees. & W.* 506. And see § 1136, *supra.*

If it is payable at a certain period from date, the maturity is fixed, and the statute will run from that time.¹⁸⁸ And if, by mistake, the date is made 1841, instead of 1840, the statute will run from the day as expressed.¹⁸⁹ If a bill is payable at a certain time after sight, the statute will run, in like manner, from its maturity.¹⁹⁰ But, if it is payable 12 months after notice, it will not begin to run until 12 months after notice is given.¹⁹¹ So, if it is payable 24 hours after demand.¹⁹² If the promise is to pay "when able," it will not begin to run until the maker becomes able, and it is for the jury to determine that time.¹⁹³ But it has been held that a note payable "so soon as I can collect it out of C." becomes due within a reasonable time, and the statute will begin to run then.¹⁹⁴ If it is payable "at such times and by such installments as the directors shall from time to time assess," it will run from the time of such assessment.¹⁹⁵ And, if a note is payable in installments, the statute will run upon each installment from its maturity.¹⁹⁶ And, if the whole becomes due upon default of any installment, the statute will run against the whole note from the time of its

¹⁸⁸ *Wittershelm v. Lady Carlisle*, 1 H. Bl. 631; *Renew v. Axton*, Carth. 3. So where the bill is offered as evidence of an account stated. *Fryer v. Roe*, 12 C. B. 437.

¹⁸⁹ *Bumpass v. Timms*, 3 Sneed (Tenn.) 459.

¹⁹⁰ *Bytes*, Bills, 347; *Chit. Bills*, 685; 2 *Pars. Notes & B.* 644; *Sturdy v. Henderson*, 4 *Barn. & Ald.* 592; *Sutton v. Toomer*, 7 *Barn. & C.* 416; 1 *Man. & R.* 125.

¹⁹¹ *Clayton v. Gosling*, 5 *Barn. & C.* 360. 8 *Dowl. & R.* 110.

¹⁹² *Bytes*, Bills, 347; *Chit. Bills*, 686; *Thorpe v. Booth*, *Ryan & M.* 388. But, if a one-day note is not delivered for many months after its date, the statute will be reckoned from one day after its delivery. *Collins v. Driscoll*, 69 *Cal.* 550, 11 *Pac.* 244.

¹⁹³ *Tebo v. Robinson*, 100 *N. Y.* 27, 2 *N. E.* 383, reversing 29 *Hun (N. Y.)* 243. So, if payable when a railroad is constructed. *Rose v. Railroad Co.*, 31 *Tex.* 49. If payable "as fast as money shall come into" the treasury of a corporation, from time when sufficient funds are received. *Freehill v. Chamberlain*, 65 *Cal.* 603, 4 *Pac.* 646. And see, too, *Sawyer v. Colgan*, 102 *Cal.* 283, 36 *Pac.* 580, if payable out of a particular fund; *Iron Mountain & H. R. Co. v. Stansell*, 43 *Ark.* 275. And see § 119, *supra*.

¹⁹⁴ *Woolbright v. Sneed*, 5 *Ga.* 167. So, where it was in work to be done. *Weymouth v. Gile*, 83 *Me.* 437, 22 *Atl.* 375.

¹⁹⁵ *In re Slater Mut. Fire Ins. Co.*, 10 *R. I.* 42.

¹⁹⁶ *Bush v. Stowell*, 71 *Pa. St.* 208; *Elchman v. Hersker*, 170 *Pa. St.* 402, 33 *Atl.* 220. But see 2 *Pars. Notes & B.* 644.

first default.¹⁹⁷ But it will not run, in general, against the interest, until the principal is also barred.¹⁹⁸

§ 1605. — If the time for payment is extended, the statute will run from the expiration of the extended time.¹⁹⁹ If an agent gives his note for work done for his principal to facilitate the obtaining of payment from the principal, the statute will run against the principal from the time when the note was made.²⁰⁰ But where a note is given for land, which is to be located by the payee, the time will not be extended by the payee's delay in making the location, although the delay was at the maker's request.²⁰¹ If an acceptance in blank is afterwards filled as to the time of payment, the statute will run from the time so designated, and not from the time the acceptance was given.²⁰² But the statute will run upon a guaranty of a note from the time of the default.²⁰³ So, it will run against an indorser from the time the note matures, although he had waived demand and notice by taking an indemnity from the maker.²⁰⁴

¹⁹⁷ Byles, Bills, 346; *Hemp v. Garland*, 4 Q. B. 519; *Harrison Mach. Works v. Reigor*, 64 Tex. 89. But, if the whole matures on an option, which is not exercised, the statute will run from maturity as originally expressed, *Moline Plow Co. v. Webb*, 141 U. S. 616, 12 Sup. Ct. 100; *Sherwood v. Wilkins* (Ark.) 45 S. W. 988. So, where the option is waived by subsequently receiving the interest, *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72.

¹⁹⁸ *Knight v. Braswell*, 70 N. C. 709. And see § 1048, *supra*.

¹⁹⁹ *Round v. Donnel*, 5 Kan. 54. So, where the extension of time is in a collateral mortgage, *Chick v. Willetts*, 2 Kan. 384; or by taking bonds payable in future, *Ætna Life Ins. Co. v. Lyon Co.*, 82 Fed. 929. So, a memorandum on a demand note, that no demand should be made in the maker's lifetime, postpones the statute until his death. *Watkins v. Figg*, 11 Wkly. Rep. 258. So, a covenant to surrender the note as security to be held by the maker pending his liability as bail for the payee. *Bowles' Ex'r v. Elmore's Adm'x*, 7 Grat. (Va.) 385. But see, *contra*, as to a contemporaneous warrant of attorney, § 199, *supra*.

²⁰⁰ *Gilmore v. Bussey*, 12 Me. 418.

²⁰¹ *Ryal v. Morris*, 68 Ga. 834, there being no such condition in the note.

²⁰² *Montague v. Perkins*, 22 Eng. Law & Eq. 516.

²⁰³ *Bank of South Carolina v. Knotts*, 10 Rich. Law (S. C.) 543. But one who has agreed absolutely with the maker to pay the note cannot set up that the note is barred as against the maker. *Amonett v. Montague*, 75 Mo. 43.

²⁰⁴ *Cockrill v. Hobson*, 16 Ala. 391.

Reckoning of Limitation.

§ 1606. In reckoning the time when a bill or note becomes barred, the day on which it becomes due is generally excluded.²⁰⁵ Thus, if it becomes due on the 24th day of December, suit may be begun on the same day of the month six years afterwards, and it will not be presumed that payment was demanded and refused at an earlier hour, and therefore more than six years before the commencement of the action.²⁰⁶ If the paper is entitled to grace, the statute will run from the expiration of the days of grace;²⁰⁷ but, if the last day of grace is a Sunday, the statute will run from the previous day; and, if the anniversary of that day is a Sunday, suit begun on the following Monday six years afterwards will be too late.²⁰⁸ It has been held, however, in some instances, that the last day of grace is to be excluded, and the statute begins to run on the following day; and suit may be begun on the anniversary of that day at the end of the statutory time.²⁰⁹

Limitation of Demand Note.

§ 1607. When a note is payable on demand, the statute of limitations runs, in general, from its date, and not from demand of payment,²¹⁰ even though it is expressly "not to draw interest during my

²⁰⁵ 2 Daniel, Neg. Inst. 245; 2 Edw. Bills & N. § 958; *Cornell v. Moulton*, 3 Denio (N. Y.) 12; *Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629. And this is true whether suit might have been brought on the day the note fell due, *Blackman v. Nearing*, 43 Conn. 56; or not, *Watkins v. Willis*, 58 Tex. 521.

²⁰⁶ *Beeman v. Cook*, 48 Vt. 201.

²⁰⁷ *Smith v. Kendall*, 6 Term R. 123; *Ferguson v. Douglas*, 6 Browne, Parl. Cas. 276; *Pickard v. Valentine*, 13 Me. 412.

²⁰⁸ *Morris v. Richards*, 45 Law T. (N. S.) 210.

²⁰⁹ *Watkins v. Willis*, 58 Tex. 521; *Ferguson v. Douglas*, 6 Browne, Parl. Cas. 276, as to Scotch bills. And in *McGraw v. Walker*, 2 Hilt. (N. Y.) 404, it was held that suit might be begun on October 5, 1858, when the right of action accrued October 4, 1852, the day after the last day of grace.

²¹⁰ Byles, Bills, 347; Benj. Chalm. Dig. art. 252; 2 Daniel, Neg. Inst. 245, 2 Pars. Notes & B. 643; *Rumball v. Ball*, 10 Mod. 38; *Collins v. Denning*, 3 Salk. 227; *Buckler v. Moor*, 1 Mod. 89; *Capp v. Lancaster*, Cro. Ellz. 548; *Howland v. Edmonds*, 24 N. Y. 307; *Herrick v. Woolverton*, 41 N. Y. 591;

life.”²¹¹ So, although it is made payable on demand with interest.²¹² But where a note is payable on demand “with interest until paid,” it is held not to be payable instantly, and the statute will only run from demand.²¹³ And, if a demand note is put in escrow to be delivered upon a certain condition, the statute will run from its delivery and not from its date.²¹⁴ A certificate of deposit in California is a note payable on demand, and the statute will run, in like manner, from date, and not from demand.²¹⁵ And this is true also of a duebill payable

Wheeler v. Warner, 47 N. Y. 519; Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588; Milne's Appeal, 90 Pa. St. 483; Cousins v. Partridge, 79 Cal. 228, 21 Pac. 745; O'Neill v. Wagner, 81 Cal. 631, 22 Pac. 876; Old Alms House Farm of New Haven v. Smith, 52 Conn. 434; Kraft v. Thomas, 123 Ind. 513, 24 N. E. 346; Fenno v. Gay, 146 Mass. 118, 15 N. E. 87; Ervin v. Brooks, 111 N. C. 358, 16 S. E. 240. And see § 85, supra. If a demand note is entitled to grace, the statute runs from the last day of grace. Bell v. Sackett, 38 Cal. 407. So, if a demand note is issued as currency under a statute providing for such currency until one year after the end of the war, the statute will run from that time without demand. Butts v. Railroad, 63 Miss. 462. So, where a note is payable on demand, or, at payee's option, out of proceeds of a sale to be made. Brown's Ex'r v. Hitchcock, 69 Vt. 197, 37 Atl. 292.

²¹¹ Newman v. Kettelle, 13 Pick. (Mass.) 418.

²¹² Benj. Chalm. Dig. art. 252; Chit. Bills, 686; Norton v. Ellam, 2 Mees. & W. 461; Wheeler v. Warner, 47 N. Y. 519; Mills v. Davis, 113 N. Y. 243, 21 N. E. 68. So, as against one who expressly guaranties payment of a demand note “with interest at seven per cent. per annum, to be paid half-yearly.” Bartholomew v. Seaman, 25 Hun (N. Y.) 619.

²¹³ Gascoyne v. Smith, McClel. & Y. 338; Barough v. White, 4 Barn. & C. 325. So, a certificate of deposit bearing interest and negotiable, and evidently intended to accumulate. Fells Point Sav. Inst. v. Weedon, 18 Md. 320.

²¹⁴ Byles, Bills, 346; Chit. Bills, 684; Irving v. Veltch, 3 Mees. & W. 90. Savage v. Aldren, 2 Starkie, 232. So, where a party indorses before its delivery a nonnegotiable note, payable on demand with interest, the statute will run against him from the date of delivery. McMullen v. Rafferty, 24 Hun (N. Y.) 368.

²¹⁵ Brummagim v. Tallant, 29 Cal. 503. Although payable “on return of this certificate properly indorsed.” Tripp v. Curtenius, 36 Mich. 494. But see, contra, as to a note payable “on demand after date,” which is not delivered until long after date. Fifth Nat. Bank of Cincinnati v. Woolsey, 21 Misc. Rep. 757, 48 N. Y. Supp. 148. But, to the effect that the statute runs only from demand on such certificate, see McGough v. Jamison, 107 Pa. St. 336; Payne v. Gardiner, 29 N. Y. 146, 39 Barb. (N. Y.) 634; Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186.

on demand;²¹⁶ or a note payable "when demanded,"²¹⁷ or "at any time within six years."²¹⁸ An indorsement of an overdue note or bill is, in effect, a demand note, and the statute runs against the indorser from the time of indorsement.²¹⁹ But where a nonnegotiable note is assigned, and the maker is insolvent at that time, it has been held that an action accrues at once to the assignee, and that the statute runs from that time in favor of the assignor.²²⁰ And the statute will run from the date of an indorsement "without recourse" on the indorser's implied warranty of genuineness or validity.²²¹

Limitation Runs from Demand.

§ 1608. Where a bill is payable "after sight," there is no right of action, and the statute will not run, until payment is demanded.²²² So, the statute will run only from demand on a note payable "one month after demand";²²³ or payable in one day "at any time during payee's natural life that she shall demand it."²²⁴ So, if a premium note is made payable on demand, with the understanding that it shall be held as a deposit note for insurance premiums, as the installments

²¹⁶ *Andress' Appeal*, 99 Pa. St. 421; *Boustead v. Cuyler*, 116 Pa. St. 551, 8 Atl. 848; *De Lavallette v. Wendt*, 75 N. Y. 579, affirming 11 Hun (N. Y.) 432; *Sheldon v. Heaton*, 88 Hun, 535, 34 N. Y. Supp. 856.

²¹⁷ *Kingsbury v. Butler*, 4 Vt. 458.

²¹⁸ *Young v. Weston*, 39 Me. 492.

²¹⁹ *Brian v. Banks*, 38 Ga. 300; *Graham v. Roberson*, 79 Ga. 72, 3 S. E. 611; or from the expiration of a reasonable time after the indorsement, *Mudd's Adm'x v. Harper*, 1 Md. 110.

²²⁰ *Whisler v. Bragg*, 31 Mo. 124.

²²¹ *Blethen v. Lovering*, 58 Me. 437.

²²² *Byles, Bills*, 347; 2 Pars. Notes & B. 644; *Holmes v. Kerrison*, 2 Taunt. 323; *Wolfe v. Whiteman*, 4 Har. (Del.) 246. So, if payable "30 days after notice." *Massie v. Byrd*, 87 Ala. 672, 6 South. 145.

²²³ *Wenman v. Insurance Co.*, 13 Wend. (N. Y.) 267. So, where no suit was brought for 20 years, during which the maker died and the payee's corporate existence ran out. *Brown v. Rutherford*, 14 Ch. Div. 687. But such note will be barred if no demand is made within the statutory six years. *Palmer v. Palmer*, 36 Mich. 487; *Knapp v. Greene*, 79 Hun, 264, 29 N. Y. Supp. 350; *Donlon v. Davidson*, 7 App. Div. 461, 39 N. Y. Supp. 1020. But see, contra, *Cooke v. Pomeroy*, 65 Conn. 466, 32 Atl. 935.

²²⁴ Although not demanded until 16 years after date, and 1 year after maker's death. *Jameson v. Jameson*, 72 Mo. 640.

may be called for, the statute will run from the time when an assessment (or demand) is made.²²⁵ So, if a note is made payable "in produce on demand, as he may want to use the same," the statute will run from the demand, however long deferred.²²⁶ Some statutes provide that, where demand is necessary to the maturity of the paper, the statute of limitations shall run from such demand, and not from date.²²⁷ And, where money is paid out by a bank on a forged check, the statute will run against the depositor's action for the recovery of the money only from the time of a demand and refusal,²²⁸ after legal determination, where the forgery is disputed.²²⁹

The liability of a drawer or indorser being contingent on default by the party primarily liable, a demand is, in general, necessary in order to fix his liability. The statute will therefore run against the drawer of a bill,²³⁰ or the indorser of a note, from the time of demand at the place named.²³¹

Limitation Runs from Payment.

§ 1609. Where an action is brought by a surety against his co-surety for contribution, the statute will run from the time of payment

²²⁵ *Bigelow v. Libby*, 117 Mass. 359. So, a stock subscription note made with like understanding, *Killbrenth v. Gaylord*, 34 Ohio St. 305; or expressly so payable, *Lycoming Fire Ins. Co. v. Batcheller*, 62 Vt. 148, 19 Atl. 982.

²²⁶ *Stanton v. Stanton's Estate*, 37 Vt. 411. But on a simple demand note demand must be made in a reasonable time, and the statute will run out in six years afterwards. *Thrall v. Mead's Estate*, 40 Vt. 540.

²²⁷ NEW YORK (Code Civ. Proc. § 410). Or from the time of the right to make demand, TENNESSEE (Shannon's Code, § 4477).

²²⁸ *Thomson v. Bank*, 82 N. Y. 1; *Bank of British North America v. Merchants' Nat. Bank of City of New York*, 91 N. Y. 106, affirming 48 N. Y. Super. Ct. 1; *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26, 9 Sup. Ct. 3.

²²⁹ *Merchants' Nat. Bank of Baltimore v. First Nat. Bank of Baltimore*, 3 Fed. 66.

²³⁰ *Picquet v. Curtis*, 1 Sumn. 478, Fed. Cas. No. 11,131. So, against the drawer of a certified check, who has withdrawn his deposit and given security to the bank, although no demand was made in seven years. *Girard Bank v. Bank of Penn Tp.*, 39 Pa. St. 92.

²³¹ And the holder is not obliged to make demand at any particular time, and cannot make it by letter. *Parker v. Stroud*, 98 N. Y. 379. But, if no demand is made until after six years, both maker and indorser will be discharged. *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588.

by the surety; and only payments which have been made within the statutory term can be recovered.²³² And the same is true of an action by a surety or accommodation party against his principal for exoneration;²³³ or by an indorser against prior parties.²³⁴ But he cannot bind him by a payment made after the statute has discharged the prior party.²³⁵ So, if a third person, for value received from the maker, promises to pay half the note when due, the statute will run in his favor against the maker from the time the note became due, and not from the maker's subsequent payment of it.²³⁶

In Georgia, after a suit is prosecuted against a nonresident maker to his insolvency, action may be brought against the indorser within the statutory six years after return of execution against the maker, although more than six years after indorsement and maturity of the note.²³⁷

²³² *Chit. Bills*, 685; *Davies v. Humfreys*, 4 Jur. 250; *Hayward v. Hapgood*, 4 Gray (Mass.) 437; *Sherwood v. Dunbar*, 6 Cal. 53; *Knotts v. Butler*, 10 Rich. Eq. (S. C.) 143; *Preston v. Gould*, 64 Iowa, 44, 19 N. W. 834; *Preslar v. Stallworth*, 37 Ala. 402.

²³³ *Reynolds v. Doyle*, 1 Man. & G. 753, 2 Scott, N. R. 45; *Collinge v. Heywood*, 9 Adol. & E. 633; *Huntley v. Sanderson*, 1 Crompt. & M. 467, 3 Tyrw. 469; *Scott v. Nichols*, 27 Miss. 94; *Graves v. Johnson*, 48 Conn. 160. So, by one maker against the co-maker, whom he has accommodated, *Wheeler v. Young*, 143 Mass. 143, 9 N. E. 531; or by a third party who has paid for the maker, *Hitt v. Sharer*, 34 Ill. 9; *Colburn v. First Baptist Church*, 60 Mich. 196, 26 N. W. 878. And see §§ 924, 976, 981, *supra*. But in Pennsylvania it has been held to run from the maturity of the note. *Farmers' Bank v. Gilson*, 6 Pa. St. 51. So, in general, if the surety pays before maturity. *Tillotson v. Rose*, 11 Metc. (Mass.) 299.

²³⁴ As against acceptor, *Bowman v. Wright*, 7 Bush (Ky.) 375; or maker. *Bullock v. Campbell*, 9 Gill (Md.) 182; or prior indorser, *Pope v. Bowman*, 27 Miss. 194; *McCrary v. Jones*, 44 S. C. 406, 22 S. E. 414. Although the statute would have barred an action by the indorsee at the time the indorser brought suit. *Godfrey v. Rice*, 59 Me. 308. In other states, however, the statute runs against the indorser, not from the time of payment, but from the maturity of the note. *Hunt v. Taylor*, 108 Mass. 508; *Kennedy v. Carpenter*, 2 Whart. (Pa.) 344; *Williams v. Durst*, 25 Tex. 667. And see §§ 1605, 1608, *supra*. The statute runs against a surety or accommodation indorser or surety, as to his principal, from payment by him, or date of judgment against him, in TENNESSEE (Shannon's Code, § 4479).

²³⁵ *Webster v. Kirk*, 17 Q. B. 944; *Wright v. Butler*, 6 Wend. (N. Y.) 284.

²³⁶ *Joiner v. Perry*, 1 Strob. (S. C.) 76.

²³⁷ *Stocks v. Moncas*, 32 Ga. 380.

In general, an action to recover money paid for an instrument which is invalid runs from the time of the payment.²³⁸ So, an action to recover the penalty for usury paid.²³⁹

Suspension of Statute.

§ 1610. There is no presumption of payment against an alien enemy from lapse of time while war is pending.²⁴⁰ And this was true of the Civil War in the United States,²⁴¹ in whichever part of the country the creditor was.²⁴² This is so where a bill or note became due after the outbreak of the war.²⁴³ But, where there was an opportunity to bring suit, it has been held in Louisiana that the statute was not suspended.²⁴⁴ It has been held that the statute was suspended as to a creditor residing in New Orleans against a debtor in Indiana, from August 16, 1861, to August 20, 1866, the date of the president's proclamation.²⁴⁵ And other dates have been fixed in several of the states.²⁴⁶ Provision for the suspension of the statute in such case has been made by act of congress,²⁴⁷ as well as some state statutes.²⁴⁸

²³⁸ *Willis v. French*, 84 Me. 593, 24 Atl. 1010; *Merchants' Nat. Bank of West Virginia v. Spates*, 41 W. Va. 27, 23 S. E. 681. But see *Jefferson Co. v. Burlington & M. R. Ry. Co.*, 66 Iowa, 385, 16 N. W. 561, and 23 N. W. 899, as to action to recover payments made by the maker on its own ultra vires bonds.

²³⁹ *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. 143; *First Nat. Bank of Gadsden v. Denson*, 114 Ala. 650, 22 South. 518; *Talbot v. Bank (Iowa)* 76 N. W. 726.

²⁴⁰ *Dunlop v. Ball*, 2 Cranch, 180.

²⁴¹ *Levy v. Stewart*, 11 Wall. 244; *Stewart v. Kahn*, Id. 493; *Kahnweiler v. Anderson*, 78 N. C. 133; *Harrison v. Henderson*, 7 Heisk. (Tenn.) 315; *Neely v. Luster*, Id. 354; *Kilpatrick v. Brashear*, 10 Heisk. (Tenn.) 372; *Gwyn v. Porter*, 5 Heisk. (Tenn.) 253; *Yancy v. Yancy*, Id. 353; *Eddins v. Graddy*, 28 Ark. 500; *Metropolitan Nat. Bank of New York City v. Gordon*, Id. 115; *Randolph v. Ward*, 29 Ark. 238; *Ahnert v. Zaun*, 40 Wis. 622; *McMerty v. Morrison*, 62 Mo. 140. And see § 249, *supra*.

²⁴² *Brown v. Hlatt*, 1 Dill. 372, Fed. Cas. No. 2,011.

²⁴³ *Ross v. Jones*, 22 Wall. 576.

²⁴⁴ *Rabel v. Pourciau*, 20 La. Ann. 131; *Payne v. Douglass*, Id. 290; *Barriere v. Stein*, Id. 397; *Norwood v. Mills*, Id. 422; *Lemon v. West*, Id. 427.

²⁴⁵ *Perkins v. Rogers*, 35 Ind. 124.

²⁴⁶ In Alabama, from January 11, 1861, to September 21, 1865 (*Coleman v. Holmes*, 44 Ala. 124; *Fox v. Lawson*, Id. 319; *Jones v. Nelson's Ex'rs*, 51

²⁴⁷ See note 247 on following page.

²⁴⁸ See note 248 on following page.

Exception as to Nonresidence.

§ 1611. Besides the other disabilities of infancy, coverture, insanity, and imprisonment provided for by the English statute, an exception

Ala. 471). In Arkansas, from May 6, 1861, the date of the ordinance of secession, to April 2, 1866 (Hall v. Denckla, 28 Ark. 506). In Mississippi, from December, 1862, to April 2, 1867 (Clopton v. Matheny, 47 Miss. 285; Wiggle v. Owen, 45 Miss. 691), the statutory suspension being "until twelve months after peace." *i. e.* April 2, 1866 (Griffing v. Mills, 40 Miss. 611). In North Carolina, from May 11, 1861, to January 1, 1870 (Plott v. Railroad, 65 N. C. 74; Johnson v. Winslow, 63 N. C. 552). In South Carolina, from April 19, 1861, to April 1, 1866 (Gooding v. Varn, Chase Dec. 286, Fed. Cas. No. 5,539). In Tennessee, by the act of 1865 (Mill. & V. Code, § 3457), from May 6, 1861, to January 1, 1867 (Boothe v. Allen, 4 Helsk. 258). In Texas, from the act of secession, January 28, 1861, until the new constitution was accepted by congress, March 29, 1870 (Graydon v. Sweet, 1 Woods, 418, Fed. Cas. No. 5,733; Bender v. Crawford, 33 Tex. 745). In West Virginia, from April 17, 1861, to March, 1865 (Huffman v. Callison, 6 W. Va. 301, 9 W. Va. 616).

247 "In all cases where, during the late Rebellion, any person could not, by reason of resistance to the execution of the laws of the United States or of the interruption of the ordinary course of judicial proceedings, be served with process for the commencement of any action, civil or criminal, which had accrued against him, the time during which such person was beyond the reach of legal process shall not be taken as any part of the time limited by law for the commencement of such action." Act June 11, 1864 (Rev. St. § 1048). And this statute is applicable both to the federal and state courts, and is retrospective. *Stewart v. Kahn*, 11 Wall. 493.

248 ALABAMA (Code, § 2638); CALIFORNIA (Code Civ. Proc. § 354); KENTUCKY (Ky. St. § 2534); MAINE (Rev. St. c. 81, § 93); MASSACHUSETTS (Pub. St. c. 197, § 10); MICHIGAN (How. Ann. St. § 8720); MINNESOTA (Gen. St. § 5150); MISSOURI (Rev. St. § 6782); NEVADA (Gen. St. § 3654), rebellion excepted; NEW YORK (Code Civ. Proc. § 404); NORTH CAROLINA (Code, § 165); OREGON (Code Civ. Proc. § 19); SOUTH CAROLINA (Code Civ. Proc. § 124); TENNESSEE (Mill. & V. Code, § 3457); TEXAS (Rev. St. art. 3215); WEST VIRGINIA (Code, c. 104, § 18); WISCONSIN (Sanb. & B. Ann. St. § 4232). So, in GEORGIA by ordinances of 1865 and 1868. *Brian v. Banks*, 38 Ga. 300; *Goodroe v. Neal*, 45 Ga. 109. The Mississippi statute has been held to be valid in *Hill v. Boyland*, 40 Miss. 618; *Mayfield v. Barnard*, 43 Miss. 270; *Buchanan v. Smith*, *Id.* 90. But a waiver of the statute will expire six years from the date of the waiver, and not add six years to the time of the statutory suspension. *Maddux v. Jones*, 51 Miss. 531. In *Smith v. Rogers*, 65 N. C. 181, it was held that the act of North Carolina was not affected by the general repealer of March 10, 1866.

is also made where the plaintiff is absent "beyond seas."²⁴⁹ And the statute has been held to be suspended in such case, although both of the parties were in France and the note was barred there.²⁵⁰ And the uncontradicted evidence of one plaintiff is sufficient to prove the non-residence of both.²⁵¹ The exception in favor of a nonresident plaintiff is made in several of the American statutes (although the phrase "beyond seas" does not occur in most of them),²⁵² and has been held to apply even against a maker who has resided within the jurisdiction long enough to bar the statute without such exception.²⁵³ In Indiana the phrase "legal disabilities" has been held to include the absence of the plaintiff from the United States.²⁵⁴

Most of the United States provide also that the statute shall be suspended if the person against whom the action accrues is at the time absent from the state, and until his return into the state.²⁵⁵ An exception has also been provided in Great Britain as to the defendant's absence "beyond seas."²⁵⁶ But, if the defendant resides once

²⁴⁹ 21 Jac. I. c. 16, § 7. It is sufficient to aver that he was absent beyond seas at maturity of the bill, and until within six years, without averring his return, and that the action was begun within six years afterwards. *Forbes v. Smith*, 11 Exch. 161. But the absence of one of two joint plaintiffs within six years is not sufficient. *Perry v. Jackson*, 4 Term R. 516.

²⁵⁰ *Lafond v. Ruddock*, 13 C. B. 813.

²⁵¹ *Koch v. Shepherd*, 18 C. B. 191.

²⁵² COLORADO (Mills' Ann. St. § 2914); ILLINOIS (Hurd's Rev. St. c. 83, § 9); MAINE (Rev. St. c. 81, § 88); MICHIGAN (How. Ann. St. § 8718); RHODE ISLAND (Gen. Laws, c. 234, § 6); TENNESSEE (Shannon's Code, § 4448). So, in PENNSYLVANIA (Dig. p. 1215, §§ 22-24), being citizens of Pennsylvania "beyond seas." And formerly in MICHIGAN, meaning "beyond the limits of the United States," *Darling v. Meachum*, 2 G. Greene (Iowa) 602; and in OHIO, meaning "without the limits of the state," *Richardson's Adm'rs v. Richardson's Adm'rs*, 6 Ohio, 125.

²⁵³ *Erskine v. Messicar*, 27 Mich. 84; *McMillan v. Wood*, 29 Me. 217.

²⁵⁴ *Bauman v. Grubbs*, 26 Ind. 419; INDIANA (Horner's Rev. St. § 296); and a similar phrase is used in KANSAS (Gen. St. c. 95, § 13).

²⁵⁵ ALABAMA (Code, § 2622); ARKANSAS (Sand. & H. Dig. § 4834); CALIFORNIA (Code Civ. Proc. § 351), if without the United States; COLORADO (Mills' Ann. St. § 2914); CONNECTICUT (Gen. St. § 1384); DELAWARE (Rev. Code, p. 889, § 14); FLORIDA (Rev. St. § 1284); ILLINOIS (Hurd's Rev. St. c. 83, § 18); INDIANA (Horner's Rev. St. § 297); IOWA (Code, § 3451); KANSAS (Gen. St. c. 95, § 15); KENTUCKY (Ky. St. § 2531); LOU-

²⁵⁶ Byles, Bills, 351; 4 Anne, c. 16, § 19.

within the jurisdiction, his subsequent nonresidence will not suspend the running of the statute.²⁵⁷ And even without such bar to the statute from nonresidence, if the action is begun after 20 years, a presumption of payment will arise from the lapse of time.²⁵⁸ The exception in the statute means an established residence out of the state,²⁵⁹ and not a temporary absence, however long.²⁶⁰ On the other hand,

ILLINOIS (Rev. Civ. Code, art. 3541); MAINE (Supp. Rev. St. c. 81, § 103); MARYLAND (Pub. Gen. Laws, art. 57, § 5); MASSACHUSETTS (Pub. St. c. 197, § 11); MICHIGAN (How. Ann. St. § 8721); MINNESOTA (Gen. St. § 5145); MISSISSIPPI (Ann. Code, § 2748); MISSOURI (Rev. St. § 6781); NEBRASKA (Comp. St. §§ 5607, 5610); NEVADA (Gen. St. § 3651); NEW HAMPSHIRE (Pub. St. c. 217, § 8); NEW JERSEY (2 Gen. St. p. 1975, § 15); NEW YORK (Code Civ. Proc. § 40); NORTH CAROLINA (Code, § 162); OHIO (Bates' Ann. St. § 4969); OREGON (Code Civ. Proc. § 16); PENNSYLVANIA (Dig. p. 1215, §§ 22-24), if beyond the limits of the United States; RHODE ISLAND (Gen. Laws, c. 234, § 5); SOUTH CAROLINA (Code Civ. Proc. § 121); TENNESSEE (Shannon's Code, § 4455); TEXAS (Rev. St. art. 3216); VERMONT (V. S. § 1211); VIRGINIA (Code, § 2933); WEST VIRGINIA (Code, c. 104, § 18); WISCONSIN (Sanb. & B. Ann. St. § 4231); and in VERMONT the statute was suspended by the statute of 1863 in favor of volunteers in the army. *Cardell v. Carpenter*, 43 Vt. 84.

²⁵⁷ ALABAMA (Code, § 2622); CALIFORNIA (Code Civ. Proc. § 351); COLORADO (Mills' Ann. St. § 2914); CONNECTICUT (Gen. St. § 1384); DELAWARE (Rev. Code, p. 889, § 14); FLORIDA (Rev. St. § 1284); GEORGIA (Civ. Code, § 3783); ILLINOIS (Hurd's Rev. St. c. 83, § 18); KANSAS (Gen. St. c. 95, § 15); KENTUCKY (Ky. St. §§ 2531-2533); MAINE (Supp. Rev. St. c. 81, § 103); MARYLAND (Pub. Gen. Laws, art. 57, § 5); MASSACHUSETTS (Pub. St. c. 197, § 11); MICHIGAN (How. Ann. St. § 8721); MINNESOTA (Gen. St. § 5145); MISSOURI (Rev. St. § 7681), *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 961; NEBRASKA (Comp. St. § 5610); NEVADA (Gen. St. § 3651); NEW JERSEY (2 Gen. St. p. 1975, § 15); NEW YORK (Code Civ. Proc. § 401); NORTH CAROLINA (Code, § 162); OHIO (Bates' Ann. St. § 4969); OREGON (Code Civ. Proc. § 16); RHODE ISLAND (Gen. Laws, c. 234, § 5); SOUTH CAROLINA (Code Civ. Proc. § 121); TENNESSEE (Shannon's Code, § 4455); TEXAS (Rev. St. art. 3216); VERMONT (V. S. § 1211); VIRGINIA (Code, § 2933); WEST VIRGINIA (Code, c. 104, § 18); WISCONSIN (Sanb. & B. Ann. St. § 4231).

²⁵⁸ *Bean v. Tonnele*, 94 N. Y. 381; *Courtney v. Staudenmayer*, 56 Kan. 302, 43 Pac. 758.

²⁵⁹ *Bucknam v. Thompson*, 38 Me. 171; *Farr v. Durant*, 90 Wis. 341, 63 N. W. 274.

²⁶⁰ *Drew v. Drew*, 37 Me. 389. But see, as to a sailor's absence for two years, *Parker v. Kelly*, 61 Wis. 552, 21 N. W. 539.

his absence may be a bar, although during the time he has been occasionally within the state, and even had property there which might be attached.²⁶¹ But, in order to plead the statute in Nevada, the defendant must have been within the state during the full time limited by the act.²⁶² If he is absent when the note matures, the statute begins to run from his return.²⁶³ But the nonresidence of one joint maker will not bar the running of the statute as to the other.²⁶⁴

§ 1612. — If the nonresidence of the maker at the time the note was made is proved, it throws on him the burden of proving his subsequent residence to bring himself within the statute.²⁶⁵ On the other hand, if the maker has moved from the state soon after the note was made, he cannot plead the bar of the statute.²⁶⁶ But if he has removed from the state, and died in another state, the statute runs in New York from the end of 18 months after his death.²⁶⁷

Where the maker never resided in the state, it has been held that the statute never began to run, on account of the exception in favor of nonresidence.²⁶⁸ And a note made in another state by one of its citizens may be sued at any time within six years after he comes

²⁶¹ *Hacker v. Everett*, 57 Me. 548. But see, *contra*, where he comes into the jurisdiction dally for his regular business. *Costello v. Downer*, 19 App. Div. 434, 46 N. Y. Supp. 713.

²⁶² *Todman v. Purdy*, 5 Nev. 238.

²⁶³ *Pratt v. Hubbard*, 1 G. Greene (Iowa) 9. And will not be affected by subsequent occasional absence. *Ingraham v. Bowle*, 33 Miss. 17.

²⁶⁴ *Low v. Allen*, 26 Cal. 141; *NEW JERSEY* (2 Gen. St. p. 1975, § 15); *Bruce v. Flagg*, 25 N. J. Law, 219. And this is now provided in *GREAT BRITAIN* by the statute 19 & 20 Vict. c. 77, § 11. Although the contrary was held to be the rule under Act 4 & 5 Anne, c. 16. *Fannin v. Anderson*, 7 Q. B. 811; *Towns v. Mead*, 16 C. B. 123.

²⁶⁵ *State Bank v. Seawell*, 18 Ala. 616.

²⁶⁶ *Haviland v. Hargis*, 9 Fla. 15.

²⁶⁷ *Christophers v. Garr*, 6 N. Y. 61; Code Civ. Proc. § 391.

²⁶⁸ *Brown v. Nourse*, 55 Me. 230; *Thompson v. Reed*, 75 Me. 404; *Bonifant v. Doniphan*, 3 Kan. 26. But in *MISSOURI* the exception does not apply in such case. *Thomas v. Black*, 22 Mo. 330. So, now in *MAINE* by act of 1885. But this act only applies to the case where both parties resided in another state, where the action is barred. *Frye v. Parker*, 84 Me. 251, 24 Atl. 844. In *MISSISSIPPI* this is true of the provision as to notes barred in the state of original residence (Code, § 2754), but not of the stay pending nonresidence (Id. § 2748). *Robinson v. Moore* (Miss.) 23 South. 631.

within the jurisdiction invoked;²⁶⁹ even though the note was already barred, in the state where it was made, while both parties resided there.²⁷⁰ On the other hand, it has been held that the exception of nonresidence is not to be applied in favor of debts to nonresident creditors accrued in another state, notwithstanding the nonresidence of the parties at the time and their subsequent removal into the jurisdiction.²⁷¹ And, a fortiori, if the action accrues in another state, and the payee continues to reside there, but the maker comes and resides within the jurisdiction for more than six years, the statute will bar the payee's action.²⁷²

Acknowledgment or New Promise.

§ 1613. An acknowledgment of the debt or a new promise to pay will, in general, revive the cause of action, and the statute will start anew from such acknowledgment or promise. It has been held that this is effected by giving a new cause of action, rather than reviving or continuing the original action.²⁷³ But this view seems to have grown out of an effort of the courts to restrain the laxity with which such acknowledgments and promises had been admitted. An acknowl-

²⁶⁹ *Way v. Sperry*, 6 Cush. (Mass.) 238. Although the statute had already partly run in the other state. *Harrison v. Bank*, 12 Neb. 490, 11 N. W. 732.

²⁷⁰ *Thompson v. Reed*, 75 Me. 404.

²⁷¹ Whether the note is already barred by the foreign statute, *Wood v. Leslie*, 35 N. J. Law, 472; *Beardsley v. Southmayd*, 15 N. J. Law, 171; or not, *Taberner v. Brentnall*, 18 N. J. Law, 262. And see *Nash v. Tupper*, 1 Caines (N. Y.) 402. And by the statute of INDIANA a nonresident maker is discharged, although the action arose in that state, if discharged by the statute of limitations of the place of his residence. *Riser v. Snoddy*, 7 Ind. 442.

²⁷² *Fletcher v. Spaulding*, 9 Minn. 64 (Gil. 54).

²⁷³ *Byles, Bills*, 352; *Tanner v. Smart*, 6 Barn. & C. 603. So, too, an acknowledgment of the debt, *Newlin v. Duncan*, 1 Har. (Del.) 204. And, where a new promise extends the note before it is barred, the action must be on the new promise, *Carr's Ex'r v. Robinson*, 8 Bush (Ky.) 260; and such new promise is of no avail without new consideration, except to suspend the statute of limitations, *Gilmore v. Green*, 14 Bush (Ky.) 772. In GEORGIA the original liability is revived expressly by the statute (Civ. Code, § 3790). But in MISSISSIPPI it has been held to be against public policy, and therefore without effect, for the maker to agree, in consideration of forbearance at the maturity of a note, that the statute of limitations should not run against it "until it was fully paid." *Crane v. French*, 38 Miss. 503.

edgment of part of the debt will have the same effect as to that part.²⁷⁴ On the other hand, a promise to pay the principal, but not the interest, will not support the recovery of interest.²⁷⁵ The promise or acknowledgment may be before the debt is barred,²⁷⁶ or afterwards.²⁷⁷ And it was formerly held that it might even be after suit brought.²⁷⁸ But a promise made on Sunday is not sufficient.²⁷⁹

Formerly an express promise was held to be necessary,²⁸⁰ but it is now established that the law implies a sufficient promise from a simple acknowledgment of the debt.²⁸¹ The acknowledgment must be such, however, as will fairly imply a promise.²⁸² And it must not

²⁷⁴ *Oliver v. Gray*, 1 Har. & G. (Md.) 204. So, an acknowledgment as "a debt due by me, less what may have been paid." *Marshall v. Smith*, 20 U. C. C. P. 356. So, a promise to pay after deductions allowed in the suit, although originally refused. *Hannah v. Hawkins*, 5 Lea (Tenn.) 240.

²⁷⁵ *Duffie v. Phillips*, 31 Ala. 571. But a note for the interest, reciting the principal note, bars the statute as to the latter. *Perry v. Slade*, 8 Q. B. 115.

²⁷⁶ *Penley v. Waterhouse*, 3 Iowa, 418. So, an acknowledgment. *Shackleford v. Douglass*, 31 Miss. 95. So, an indorsement, "this note shall not be outlawed." *In re King's Estate*, 94 Mich. 411, 54 N. W. 178.

²⁷⁷ *Godwin v. Culley*, 4 Hurl. & N. 373; *Hanger v. Dodge*, 24 Ark. 205; *Buffington v. Davis*, 33 Md. 511. But see, as to statute of Ohio, *Hill v. Henry*, 17 Ohio, 9. And such promise will not include interest not expressly mentioned. *Hartley v. Requa*, 17 Misc. Rep. 74, 39 N. Y. Supp. 846.

²⁷⁸ *Danforth v. Culver*, 11 Johns. (N. Y.) 146. So, too, an acknowledgment. *Oliver v. Gray*, 1 Har. & G. (Md.) 204; *Yea v. Fouraker*, 2 Burrows, 1099; *Lloyd v. Maund*, 2 Term R. 760. But in England the promise or acknowledgment must now be before action brought. *Byles, Bills*, 357; *Tanner v. Smart*, 6 Barn. & C. 603, 9 Dowl. & R. 549. But, where a pledgor sues to recover a pledge securing a debt that is barred, his admission of the debt in his pleading will revive it. *Gage v. Trust Co.*, 86 Fed. 984.

²⁷⁹ *Bumgardner v. Taylor*, 28 Ala. 687.

²⁸⁰ *Dickson v. Thomson*, 2 Show. 226; *Luna v. Edmiston*, 5 Sneed (Tenn.) 159. So, as against an executor, *Tullock v. Dunn*, Ryan & M. 416.

²⁸¹ *Byles, Bills*, 353; *Chit. Bills*, 689; 2 Pars. Notes & B. 648; *Hart v. Prendergast*, 14 Mees. & W. 741; *Baxter v. Penniman*, 8 Mass. 133; *Parker v. Butterworth*, 46 N. J. Law. 244; *Felty v. Young*, 18 Md. 163; *Newlin v. Duncan*, 1 Har. (Del.) 204; *Shackleford v. Douglass*, 31 Miss. 95; *Porter v. Hill*, 4 Me. 41; *Butler v. Winters*, 2 Swan (Tenn.) 91.

²⁸² *Haydon v. Williams*, 7 Bing. 166, 4 Moore & P. 811; *Chambers v. Garland*, 3 G. Greene (Iowa) 322. And not a mere admission of legal liability. *Pritchard v. Howell*, 1 Wis. 131, or a letter inquiring what amount the creditor would take, or referring to a previous payment by the maker, *Weston v. Hodgkins*, 136 Mass. 326. So, it is not enough for a security to take security from his

be accompanied with any expression which would repel that inference.²⁸³ And the new acknowledgment or promise must identify the debt, either expressly or by plain reference.²⁸⁴ A general acknowledgment, applicable to other debts as well, will not be sufficient.²⁸⁵ And the acknowledgment must be unequivocal.²⁸⁶ Where it is contained in an ambiguous letter, the identity of the instrument referred to is a question for the jury.²⁸⁷ But the construction of an ambiguous writing is, in general, a question for the court.²⁸⁸

principal. *Holt v. Gage*, 60 N. H. 536, 19 Cent. Law J. 417. But indorsing a waiver of the statute is sufficient. *Jordan v. Jordan*, 85 Tenn. 561, 3 S. W. 806.

²⁸³ *Byles*, Bills, 353; *Fearn v. Lewis*, 6 Bing. 349, 4 Moore & P. 1; *Scales v. Jacob*, 3 Bing. 638, 11 Moore, 553. Thus, the statute will not be barred if there is an accompanying statement that he was not liable, because the bill was without consideration, *Easterly v. Pullen*, 3 Starkie, 186; or that the stamp was insufficient, and he would never pay it, *A'Court v. Cross*, 3 Bing. 329; or that the note was outlawed, and he meant to avail himself of the statute, although he admitted the note to be genuine, *Danforth v. Culver*, 11 Johns. (N. Y.) 146; or that he "had lost a great deal, and could not pay it," *Galpin v. Barney*, 37 Vt. 627; or was willing to pay but unable to do so, *Hancock v. Bliss*, 7 Wend. (N. Y.) 267; or thought it was paid, *Grantham v. Powell*, 6 U. C. Q. B. 494; or paid by services intended by him to be so applied, and he would produce the account, which he afterwards said was destroyed, *Bradley v. Field*, 3 Wend. (N. Y.) 272. On the other hand, the statute has been held to be barred, although the acknowledgment was accompanied with a refusal to pay or an excuse because the note was barred, *Oliver v. Gray*, 1 Har. & G. (Md.) 204; or that he was not then liable, because the bill was outlawed, and that he would not pay, and it was not in his power to do so, *Leaper v. Tatton*, 16 East. 420.

²⁸⁴ *Lechmere v. Fletcher*, 1 Crompt. & M. 623; *Mayfaith's Appeal* (Pa. Sup.) 2 Atl. 28. But it is not necessary that the note should have been produced at the time. *Guy v. Tams*, 6 Gill (Md.) 82.

²⁸⁵ *Smith v. Moulton*, 12 Minn. 352 (Gil. 229). But it will not be presumed that there are other debts until shown. *Whitney v. Bigelow*, 4 Pick. (Mass.) 110.

²⁸⁶ *Fearn v. Lewis*, 4 Car. & P. 173, 6 Bing. 349; *Landis v. Roth*, 109 Pa. St. 621, 1 Atl. 49. But it need not be in set terms, or even name the precise amount, or it may indicate the amount approximately. *Dinsmore v. Dinsmore*, 21 Me. 433.

²⁸⁷ *Frost v. Bengough*, 8 Moore, 180, 1 Bing. 266. And it has been held to be a question for the jury whether the expressions used amount to an acknowledgment. *Penley v. Waterhouse*, 3 Iowa, 418.

²⁸⁸ *Morrell v. Frith*, 3 Mees. & W. 402. So, as to words amounting to an express promise. *Evans v. Carey*, 29 Ala. 99; or to an acknowledgment, *Oliver v. Gray*, 1 Har. & G. (Md.) 204.

Sufficient Acknowledgment or Promise.

§ 1614. Giving a bill of exchange in payment is *prima facie* a promise sufficient to bar the statute.²⁸⁹ So, if a guarantor gives his note for the interest;²⁹⁰ or if the maker gives a chattel mortgage.²⁹¹ And it is a sufficient acknowledgment by a surety if he refers the holder to his principal, and the principal makes a payment.²⁹² So, it will be sufficient if the maker assigns his property for the payment of debts, and the assignee makes a payment under a direction to that effect in the assignment.²⁹³ So, a written acknowledgment in a contract for compromising a note is sufficient;²⁹⁴ or a provision in the maker's will that his debts should be paid, and, first, those to the payee;²⁹⁵ or an indorsement that "the note is all right, and I think I can pay \$100 next fall."²⁹⁶

And where the maker of a note alters the date, and indorses his initials on it, and delivers it again, it will amount to a new promise to pay, although not a new note.²⁹⁷ And if, after a note is barred, the maker affixes his seal to it, it will turn it into a sealed instrument, with a longer term of limitation.²⁹⁸ So, an agreement under seal to renew a note, "whenever the exact amount due is ascertained," is a sufficient promise.²⁹⁹ So, a sufficient acknowledgment or promise may be made by letter,³⁰⁰ although the note is under seal.³⁰¹

²⁸⁹ *Turney v. Dodwell*, 3 El. & Bl. 136. As a promise at the time of drawing, not at the time of payment. *Gowan v. Forster*, 3 Barn. & Adol. 507.

²⁹⁰ *Sigourney v. Wetherell*, 6 Mete. (Mass.) 553; *Taylor v. Slater*, 16 R. I. 86, 12 Atl. 727.

²⁹¹ *Market v. Plant* (Miss.) 1 South. 250.

²⁹² *Winchell v. Hicks*, 18 N. Y. 558.

²⁹³ *Barger v. Durvin*, 22 Barb. (N. Y.) 68.

²⁹⁴ *Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149.

²⁹⁵ *Bullard v. Thompson*, 35 Tex. 313.

²⁹⁶ *Russell & Co. v. Davis*, 51 Minn. 482, 53 N. W. 766.

²⁹⁷ *Bourdin v. Greenwood*, L. R. 13 Eq. 281. But an alteration indorsed on the note amounts to an acknowledgment of the debt. *Mitchell v. McHenry*, 62 Iowa, 352, 17 N. W. 578.

²⁹⁸ *Hanger v. Dodge*, 24 Ark. 205.

²⁹⁹ *Hart v. Boyt*, 54 Miss. 547. Or even an offer to renew. *Hubbard v. Bugbee*, 58 Vt. 172, 2 Atl. 594. Or an indorsement of renewal. *McKay v. Overton*, 65 Tex. 82.

³⁰⁰ E. g. saying, "A. stated that the amount due against me was £1,000. Of

³⁰¹ *Webb v. Carter*, 62 Ga. 415.

Insufficient Acknowledgment or Promise.

§ 1615. An offer to pay part of a note in satisfaction of the whole, not accepted by the holder, is not a sufficient promise.³⁰² So, too, an offer to allow the amount of a draft in compromise;³⁰³ or a statement

course, this includes the note that I jointly signed with B. You are aware you have £25 to my credit." *Godwin v. Culley*, 4 Hurl. & N. 373. Or, "I will try and pay you a little at a time if you will let me. I am anxious to get out of your debt. I will endeavor to send you a little next week." *Lee v. Willmot*, L. R. 1 Exch. 364. Or, "I hope to be at H. soon, when I trust everything will be arranged with A. agreeable to her wishes." *Edmonds v. Goater*, 15 Beav. 415. Or, "I cannot send you the £20. I have no money by me now, nor shall I have till after the fair. Your better way will be to give up that bill and draw another for £30, the balance of the account, which shall be honored when due." *Dabbs v. Humphrey*, 4 Moore & S. 285, 10 Bing. 446. Or, "By next month I shall have my bankers' account here, and I shall remit the sum due to you in a draft on them." *Lang v. Mackenzie*, 4 Car. & P. 463. Or, "The old account has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid." *Chasemore v. Turner*, L. R. 10 Q. B. 500. Or, "I have note in bank that should be renewed, and I have the money to do so, but have not time. If you could send the old note to A., with statement, he would receive the money and a new note and forward to you." *Brown v. State Bank*, 10 Ark. 134. Or saying he could not pay, but would pay by installments. *Wilby v. Elgee*, L. R. 10 C. P. 497. Or regretting that he "cannot remit," and referring the holder to his agent. *Buffington v. Davis*, 33 Md. 511. Or saying he had signed, and in the end thought he should have to pay, and "that enough had been paid to pay the debt if it had been presented when it should have been." *Phelps v. Williamson*, 26 Vt. 230. Or saying he thought he "had settled. If not, I am willing to do so now." *Shaw v. Lambert*, 14 App. Div. 263, 43 N. Y. Supp. 470. So, a letter promising "to pay the balance," but not specifying the amount, will support a recovery of nominal damages. *Dickinson v. Hatfield*, 1 Moody & R. 141, 5 Car. & P. 46. See, too, *Byles, Bills*, 354; *Chit. Bills*, 689; *Dodson v. Mackey*, 4 Nev. & M. 327.

³⁰² *Batchelder v. Batchelder*, 48 N. H. 23. Or an agreement to give in satisfaction a smaller note, afterwards offered and refused. *Smith v. Eastman*, 3 Cushing (Mass.) 355. Or to pay in Confederate currency. *Simonton v. Clark*, 65 N. C. 525. So, a general offer in the petition of a bankrupt to assign for the benefit of creditors. *Everett v. Robertson*, 1 El. & El. 16.

³⁰³ *Whitney v. Reese*, 11 Minn. 138 (Gil. 87). So, an offer to compromise, saying the note could not be enforced at law, and he would never pay because it was an unjust debt. *Laurence v. Hopkins*, 13 Johns. (N. Y.) 288. But a written proposal of compromise is a sufficient acknowledgment in Louisiana. *Kohn v. Davidson*, 23 La. Ann. 467.

that, "if you produce any notes against me, I will pay them." coupled with an admission that certain notes then handed to him were still due.³⁰⁴ So, it is not a sufficient acknowledgment to prove an account against the estate of an intestate, and credit him with the amount of the note in question;³⁰⁵ or to consent that the holder may receive a dividend from the estate of another maker, and "not prejudice your claim upon me for the same debt";³⁰⁶ or to admit that the payee complained because the maker did not pay more.³⁰⁷

And where an administrator put on his inventory a duebill given by himself to the deceased, which was barred by the statute, it was held that this was not a sufficient promise to take it out of the statute.³⁰⁸ So, it is not a sufficient acknowledgment to include a note in the schedule of the maker's creditors in insolvency;³⁰⁹ or in an unsigned schedule of debts made for his private use.³¹⁰ In like manner, an ambiguous statement in a letter will not amount to an acknowledgment or promise.³¹¹

Verbal and Conditional Promises.

§ 1616. It has been held that the new promise could not be proved by a verbal or written contract without the signature of the promisor;³¹² and this is now established in Great Britain by statute.³¹³

³⁰⁴ Norton v. Colby, 52 Ill. 198.

³⁰⁵ Smith v. Talbot, 11 Ark. 666.

³⁰⁶ Cockrill v. Sparkes, 1 Hurl. & C. 699.

³⁰⁷ Anderson v. Robertson, 24 Miss. 389.

³⁰⁸ Black v. White, 13 S. C. 37.

³⁰⁹ Roscoe v. Hale, 7 Gray (Mass.) 274; Hidden v. Cozzens, 2 R. I. 401; Smith v. Palfrey, 28 La. Ann. 615.

³¹⁰ Wellman v. Southard, 30 Me. 425.

³¹¹ E. g. saying, "I am sorry I cannot do anything for you at present, but shall remember you as soon as possible." Gemmell v. Colton, 6 U. C. C. P. 57. Or, "I am going to A. to-morrow and will send \$50, which is all I can spare at present." Eckford v. Evans, 56 Miss. 18. Or, "I would thank you to send me a statement, * * * if I should not be able to visit you soon. I will write again." Gibson v. Grosvenor, 4 Gray (Mass.) 606. So, if the maker's administrator writes, "An arrangement will soon be made to pay the note. I calculate, and always calculated, to pay it." Oakes v. Mitchell, 15 Me. 360.

³¹² Byles, Bills, 361; Willis v. Newham, 3 Younge & J. 518; Baildon v. Walton, 1 Exch. 632.

³¹³ Byles, Bills, 361; Chit. Bills, 688; 2 Pars. Notes & B. 631; 9 Geo. IV. c. 14; Irving v. Veitch, 3 Mees. & W. 98; Hyde v. Johnson, 2 Bing. N. C. 776, 3

In like manner, it is provided in many of the United States that an acknowledgment or promise, in order to bar the statute of limitations or be admissible as evidence of a new contract, must be in writing, and signed by the party to be bound.³¹⁴ Before the passage of these acts, however, a verbal promise was sufficient.³¹⁵

The acknowledgment or promise to pay must not be conditional;³¹⁶ or, if conditional, the condition must be shown to have been per-

Scott, 239. Although it was made before January 1, 1829, when the act went into effect. *Towler v. Chatterton*, 6 Bing. 258, 3 Moore & P. 619; *Hilliard v. Lenard*, Moody & M. 297.

³¹⁴ ALABAMA (Code, § 2628); ARKANSAS (Sand. & H. Dig. § 4837); CALIFORNIA (Code, Civ. Proc. § 360); GEORGIA (Civ. Code, § 3788), but a credit indorsed on a note by a debtor, or any other written acknowledgment, is equal to a new promise (section 3780); ILLINOIS (Hurd's Rev. St. c. 83, § 16); INDIANA (Horner's Rev. St. § 301); IOWA (Code, § 3456); KANSAS (Gen. St. c. 95, § 18); LOUISIANA (Rev. Civ. Code, art. 2278); MAINE (Rev. St. c. 81, § 97); MASSACHUSETTS (Pub. St. c. 197, § 15); MICHIGAN (2 How. Ann. St. § 8725); MINNESOTA (Gen. St. § 5154); MISSISSIPPI (Ann. Code, § 2757), *Lamkin v. Nye*, 43 Miss. 241; MISSOURI (Rev. St. § 6793), *Blackburn v. Jackson*, 26 Mo. 308; NEBRASKA (Comp. St. § 5612); NEVADA (Gen. St. § 3660); NEW JERSEY (2 Gen. St. p. 1976, § 17), *Parker v. Butterworth*, 46 N. J. Law, 244; NEW YORK (Code Civ. Proc. § 395); NORTH CAROLINA (Code, § 172), especially after the note is already barred, *Pool v. Bledsoe*, 85 N. C. 1; OHIO (Bates' Ann. St. § 4092); OREGON (Code Civ. Proc. c. 24); SOUTH CAROLINA (Code Civ. Proc. § 131); TEXAS (Rev. St. art. 3219); VERMONT (V. S. § 1215); VIRGINIA (Code, § 2922); WEST VIRGINIA (Code, c. 104, § 8); WISCONSIN (Sanb. & B. Ann. St. § 4243). And an acknowledgment in writing, not signed or delivered, is not sufficient. *Green v. Goble*, 7 Kan. 297. But a verbal promise not to plead the statute may be enforced to prevent fraud on the promisor's part. *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481.

³¹⁵ *Horner v. Starkey*, 27 Ill. 13; *Sennott v. Horner*, 30 Ill. 429; *Carothers v. Hurley*, 41 Miss. 71, before the Code of 1857. And a promise to "settle" the note at a future day was sufficient without production of the note, if there was no misunderstanding and the claim was presented and ready to be exhibited. *Brody v. Doherty*, 30 Miss. 40. But the former Mississippi statute required the acknowledgment to be made on presentation of the note. *Foute v. Bacon*, 24 Miss. 156. Or the promise to be made in writing and signed. *Briscoe v. Anketell*, 28 Miss. 361. And it was held to be sufficient in Texas if the maker said he was willing to pay a note which was already barred. *McDonald v. Grey*, 29 Tex. 80.

³¹⁶ *Sweet v. Franklin*, 7 R. I. 356.

formed.³¹⁷ Thus, if the maker of a note said it was an honest debt, and he would pay it when he got able, it would be a sufficient bar on proof of his ability to pay.³¹⁸ So, in Illinois, where the maker gave a verbal promise to pay when he could "make a raise, if the payee would wait awhile."³¹⁹ And an acknowledgment that a note is due and unpaid, with a promise to pay, if credited by the holder's firm with certain rents, is sufficient.³²⁰ But a written promise to pay at a certain time, unless he "should find a receipt in the meanwhile," has been held not to be so.³²¹

Promise by Agent—Executor—Surety.

§ 1617. The acknowledgment or promise may be made by an agent, but the holder cannot act as agent for the maker.³²² A wife may, however, bind her husband as agent by such promise.³²³

³¹⁷ Byles, Bills, 353; Chit. Bills, 689; *Tanner v. Smart*, 6 Barn. & C. 603, 9 Dowl. & R. 549; *Kennett v. Milbank*, 8 Bing. 38; 1 Moore & S. 102; *Linsell v. Bonsor*, 2 Bing. N. C. 241, 2 Scott, 399; *Wakeman v. Sherman*, 9 N. Y. 85; *Parker v. Butterworth*, 46 N. J. Law, 244; *Guy v. Tams*, 6 Gill (Md.) 82; *Porter v. Hill*, 4 Me. 41; *Shaw v. Newell*, 1 R. I. 488; *Farmers' Bank of Virginia v. Clarke*, 4 Leigh (Va.) 603; *Deshon v. Eaton*, 4 Me. 413.

³¹⁸ *Dean v. Hewit*, 5 Wend. (N. Y.) 257. So, a promise to pay "as soon as convenient." *Edmunds v. Downes*, 2 Comp. & M. 459, 4 Tyrw. 173. Or "as soon as I can." *Tanner v. Smart*, 6 Barn. & C. 603, 9 Dowl. & R. 549; *Scales v. Jacob*, 3 Bing. 638. Or a request to "allow it to rest until I am in better condition to liquidate it." *Parker v. Butterworth*, 46 N. J. Law, 244. But a promise to pay "when able" has been held not to be sufficient. *Willcox v. Williams*, 5 Nev. 206. So, a statement that he had sufficient assets, and expected to realize, and would pay out of such assets if he had time. *Wells v. Hill*, 118 N. C. 900, 24 S. E. 771. So, where the debtor said he desired to pay when able, and the claim was already barred, and was not exhibited to him at the time. *Adams v. Torrey's Ex'rs*, 26 Miss. 499. And see § 111, *supra*.

³¹⁹ *Horner v. Starkey*, 27 Ill. 13; *Sennott v. Horner*, 30 Ill. 429.

³²⁰ *Mitchell v. Sellman*, 5 Md. 376.

³²¹ *Aldrete v. Demitt*, 32 Tex. 575.

³²² *Wright v. Bessman*, 55 Ga. 187. And a corporation will not be bound by the promise of its general agent. *Watts v. Devor*, 1 Grant. Cas. (Pa.) 267.

³²³ Byles, Bills, 358; *Palethorp v. Furnish*, 2 Esp. 511. But the husband's promise will not bind his wife at common law. *Moore v. Leseur*, 18 Ala. 606. And she will not be bound by her own promise after coverture, or by that of a co-maker. *Pittam v. Foster*, 1 Barn. & C. 248, 2 Dowl. & R. 363. And the joint obligation of husband and wife for a debt on which he was liable as

An express promise by an executor will bind his testator's estate, but not a mere acknowledgment by him, which does not necessarily imply a promise;³²⁴ nor a letter from the executor, admitting the justice of the debt, but saying he was compelled to refuse payment until ordered by the court.³²⁵ And in Mississippi it has been held that the executor's promise will not bar the statute.³²⁶ In like manner, the acknowledgment of an administrator will not bar the statute;³²⁷ nor even his written promise made before the statute had run out.³²⁸

An acknowledgment or promise by the principal maker will not bind a surety.³²⁹ And in Georgia the statute provides that no surety shall be bound by a payment or promise made by the principal or by a co-surety.³³⁰

Promise by Joint Maker.

§ 1618. Before the recent statutes to the contrary, a new promise made by one joint maker or indorser revived the action as to all.³³¹

surety will not bar the statute against his original liability. *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833.

³²⁴ Byles, Bills, 355; *Tullock v. Dunn*, Ryan & M. 416. But in Massachusetts an admission by an executor has been held to bar the statute of limitations, although not specially declared on. *Baxter v. Penniman*, 8 Mass. 133. He cannot, however, receive a testator's note in favor of himself as holder. *Wadleigh v. Jordan*, 74 Me. 483.

³²⁵ *Briggs v. Wilson*, 39 Eng. Law & Eq. 62.

³²⁶ *Sanders v. Robertson*, 23 Miss. 389. And see *Riser v. Snoddy*, 7 Ind. 442.

³²⁷ *Bunker v. Athearn*, 35 Me. 364.

³²⁸ *Huntington v. Bobbitt's Heirs*, 46 Miss. 528.

³²⁹ *Perham v. Raynal*, 2 Bing. 306, 9 Moore, 566; *Frye v. Barker*, 4 Pick. (Mass.) 382. And if a surety induces the holder to delay proceedings against the principal by his own absolute promise, the statute will run in his favor from the date of such promise. *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702.

³³⁰ GEORGIA (Civ. Code, § 2975). So, an indorser will not be bound by a new promise made by the maker. *Dean v. Munroe*, 32 Ga. 28.

³³¹ *Pike v. Warren*, 15 Me. 300; *Dinsmore v. Dinsmore*, 21 Me. 433; *Frye v. Barker*, 4 Pick. (Mass.) 382; *Clark v. Sigourney*, 17 Conn. 511; *Colt v. Tracy*, 8 Conn. 268; *Boulet v. Sarpy*, 30 La. Ann. 494. So, an acknowledgment by one joint maker. *Getchell v. Heald*, 7 Me. 26. Although made after the debt is barred. *White v. Hale*, 3 Pick. (Mass.) 291. But see, contra, in such case, *Lowther v. Chappell*, 8 Ala. 353. And in MISSISSIPPI, before the Code of 1857, a joint maker was not bound by a promise signed by his co-maker only, or an acknowledgment of his co-maker without presentment of the note acknowledged. *Foute v. Bacon*, 24 Miss. 156.

So, a promise by one maker of a joint and several note.³³² But not so an acknowledgment made by one joint maker by indorsing payment after he had transferred his interest.³³³ On the other hand, even after dissolution of a firm, the joint obligation was held to continue, and one partner might bind the other by his promise upon making a part payment.³³⁴ But a contrary rule is now established in many states.³³⁵ And a distinction is made under the statute of 9 Geo. IV. c. 14, between verbal and written acknowledgments; and a written acknowledgment (which must be signed by the party to be charged) cannot be made binding upon a partner or joint maker who did not sign it.³³⁶ And in many of the United States it is expressly provided that the statute shall not be barred as to any party by the acknowledgment or promise of another, who is jointly liable.³³⁷ This applies also to a promise

³³² *Sifton v. McCabe*, 6 U. C. Q. B. 294; *Dinsmore v. Dinsmore*, 21 Me. 433. Although the maker, against whom the note was revived, was only a surety. *Shepley v. Waterhouse*, 22 Me. 497.

³³³ *Wellman v. Southard*, 30 Me. 425.

³³⁴ *Byles, Bills*, 358; 2 Pars. Notes & B. 657; *Wood v. Braddick*, 1 Taunt. 104. So, by an acknowledgment of the debt. *McIntire v. Oliver*, 9 N. C. 209; *Wheelock v. Doolittle*, 18 Vt. 440; *Walton v. Robinson's Adm'r*, 27 N. C. 341. Or a new promise. *Clement v. Clement*, 69 Wis. 602, 35 N. W. 17. And he might bind a dormant partner. *Bridge v. Gray*, 14 Pick. (Mass.) 55.

³³⁵ *Van Keuren v. Parmelee*, 2 N. Y. 523; *Whitney v. Reese*, 11 Minn. 138 (Gil. 87); *Ellcott v. Nichols*, 7 Gill (Md.) 85. So, as to an acknowledgment. *Bell v. Morrison*, 1 Pet. 351; *Levy v. Cadet*, 17 Serg. & R. (Pa.) 126; *Belote's Ex'rs v. Wynne*, 7 Yerg. (Tenn.) 533; *Muse v. Donelson*, 2 Humph. (Tenn.) 166; *Stelle v. Jennings*, 1 McMul. (S. C.) 297; *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371; *Terry v. Platt* (Del. Super.) 40 Atl. 243. Or an alteration extending the time of payment (and, with it, the statute). *Mitchell v. McHenry*, 62 Iowa, 352, 17 N. W. 578.

³³⁶ *Martin v. Bridges*, 3 Car. & P. 83.

³³⁷ ARKANSAS (Sand. & H. Dig. § 4838), but not as to payments. COLORADO (Mills' Ann. St. §§ 2918, 2922). GEORGIA (Civ. Code, §§ 3791, 3792). INDIANA (Horner's Rev. St. § 302). MAINE (Rev. St. c. 81, §§ 97, 100), and payments. MASSACHUSETTS (Pub. St. c. 197, § 17). MICHIGAN (2 How. Ann. St. §§ 8726, 8727). MISSISSIPPI (Ann. Code, § 2757). As to a written promise by one joint promisor, *Foute v. Bacon*, 24 Miss. 156. So, *Briscoe v. Anketell*, 28 Miss. 361, whether promise or acknowledgment. MISSOURI (Rev. St. § 6794). NEW JERSEY (2 Gen. St. p. 1976, § 17). NORTH CAROLINA (Code, § 171). VERMONT (V. S. § 1217). VIRGINIA (Code, § 2923). WEST VIRGINIA (Code, c. 104, § 9). WISCONSIN (Sanb. & B. Ann. St. § 4244). So, in PENNSYLVANIA. *Bush v. Stowell*, 71 Pa. St. 208. So, as to a sealed note in NORTH

made by one joint maker after the note has become barred.³³⁸ So, an acknowledgment by one surety will not be binding upon the co-surety.³³⁹

Acknowledgment—To Whom and How Made.

§ 1619. The acknowledgment or promise may be made to an agent;³⁴⁰ or even, it has been held, to one who is a stranger to the paper.³⁴¹ Thus, a recital in a deed to a third party, that the bill was outstanding and unpaid, has been held sufficient.³⁴² And an acknowledgment or promise made to a party inures to the benefit of subsequent holders.³⁴³ And even a letter by one maker of a joint and several note to another has been held to bar the statute as against the writer.³⁴⁴

Upon an agreement after maturity to pay a bill in installments the statute will run from the maturity of the installment.³⁴⁵ But upon a general promise of payment it will run from, and include, the date

CAROLINA. *Campbell v. Brown*, 86 N. C. 376. And judgment suffered by one of several joint makers of a sealed note will not be an acknowledgment to bind the others. *Lane v. Richardson*, 79 N. C. 159. *Mitchell v. McHenry*, 62 Iowa, 352, 17 N. W. 578.

³³⁸ *Parker v. Butterworth*, 46 N. J. Law, 244.

³³⁹ *Winchell v. Hicks*, 18 N. Y. 558.

³⁴⁰ *Burt v. Palmer*, 5 Esp. 145. Or an attorney having the note for collection. *Sennott v. Horner*, 30 Ill. 429.

³⁴¹ *Peters v. Brown*, 4 Esp. 46; *Oliver v. Gray*, 1 Har. & G. (Md.) 204. But in New York it has been held that it must be to the creditor or his agent. *Wakeman v. Sherman*, 9 N. Y. 85. And see *Whitney v. Bigelow*, 4 Pick. (Mass.) 110. See, too, § 155 n., *supra*.

³⁴² *Byles, Bills*, 361; *Mountstephen v. Brooke*, 1 Barn. & Ald. 224. So, in New York, if the recital is intended to be communicated to the creditor and the grantee assumes the payment of the note. *De Freest v. Warner*, 98 N. Y. 217.

³⁴³ *Byles, Bills*, 361; *Benj. Chalm. Dig. art. 253*; *Gale v. Capern*, 1 Adol. & E. 102, 3 Nev. & M. 863; *Cripps v. Davis*, 12 Mees. & W. 159; *Dean v. Hewit*, 5 Wend. (N. Y.) 257; *Marshall v. Smith*, 20 U. C. C. P. 356.

³⁴⁴ *Byles, Bills*, 361; *Chit. Bills*, 687; *Halliday v. Ward*, 3 Camp. 32. But a promise by the assignee of one partner to his co-maker will not be sufficient. *Wellman v. Southard*, 30 Me. 425.

³⁴⁵ *Irving v. Veltch*, 3 Mees. & W. 90.

of the promise.³⁴⁶ So, it runs from the date of an indorsement to pay "in any time within six years."³⁴⁷ But if the maker promises not to set up the statute, if the holder wait until his circumstances enable him to pay, the statute will begin to run in his favor from the time he becomes able, although the holder received no notice and had no knowledge of it until many years afterwards.³⁴⁸

Proof of Acknowledgement.

§ 1620. The burden of proving a promise to bar the statute is upon the party alleging it.³⁴⁹ If only one debt is shown, the defendant has the burden of proving that the promise did not relate to that debt, but to some other.³⁵⁰ But it may be shown that the acknowledgment related to a debt of approximately the same amount.³⁵¹ A simple indorsement, unexplained, is not sufficient evidence of itself to bar the statute,³⁵² although formerly an indorsement in the handwriting of a deceased payee was held to be sufficient in Maine.³⁵³ Where the statute requires the acknowledgment to be in writing, signed by the party to be bound, a mere indorsement of payment is not sufficient.³⁵⁴ But, if there has been a sufficient written acknowledgment, its contents may be proved by parol evidence, where admissible, as in other cases.³⁵⁵

³⁴⁶ *Presbrey v. Williams*, 15 Mass. 193. Or if the maker is then out of the state, as soon as he comes into it. *Little v. Blunt*, 9 Pick. (Mass.) 488.

³⁴⁷ *Young v. Weston*, 39 Me. 492.

³⁴⁸ *Waters v. Thanet*, 2 Q. B. 757.

³⁴⁹ *Riser v. Snoddy*, 7 Ind. 442. And it is not enough to prove an acknowledgment that the debt is not paid, without acknowledgment or proof of its existence. *Oliver v. Gray*, 1 Har. & G. (Md.) 204.

³⁵⁰ *Guy v. Tams*, 6 Gill (Md.) 82. Although the acknowledgment was of a general indebtedness. *Whitney v. Bigelow*, 4 Pick. (Mass.) 110.

³⁵¹ *Dinsmore v. Dinsmore*, 21 Me. 433.

³⁵² *Rogers v. Anderson*, 40 Mich. 290. So, an indorsement signed by the payee "Credit \$15 by J. S." *Guignard v. Parr*, 4 Rich. Law (S. C.) 184.

³⁵³ *Coffin v. Bucknam*, 12 Me. 471.

³⁵⁴ *Parker v. Butterworth*, 46 N. J. Law, 244; *Hale v. Wilson* (Iowa) 3 N. W. 739.

³⁵⁵ *Haydon v. Williams*, 7 Bing. 163, 4 Moore & P. 811. E. g. to prove the date of a letter acknowledging a debt. *Edmunds v. Downes*, 2 Crompt. & M. 459.

Acknowledgment by Payment.

§ 1621. Part payment of a bill or note amounts to an acknowledgment of the debt, from which a promise will be implied.³⁵⁶ And a payment of interest is, in general, sufficient to take the principal debt out of the statute,³⁵⁷ although the payment was made within the six years, but the interest was due long before.³⁵⁸ And it has been suggested, although without apparent good reason, that a payment of the principal will, in like manner, take the unpaid interest out of the statute.³⁵⁹ The act of 9 Geo. IV. leaves the effect of a part payment as it was before, unchanged.³⁶⁰ But in some of the United

³⁵⁶ Byles, Bills, 352; *Hollis v. Palmer*, 2 Bing. N. C. 713, 3 Scott. 265; *Willely v. State*, 105 Ind. 453, 5 N. E. 884; *Evans v. Smith*, 34 Me. 33; *Eaton v. Gillet*, 17 Wis. 435; *Allen v. Clark*, 49 Vt. 390; *Buckingham v. Orr*, 6 Colo. 587; *Engmann v. Immel*, 59 Wis. 249, 18 N. W. 182; *Newlin v. Duncan*, 1 Har. (Del.) 204. So, a payment within 20 years on a witnessed note, *Estes v. Blake*, 30 Me. 164; especially where it is accompanied by an express agreement for another payment, *McGehee v. Blackwell*, 28 Ark. 27; but the action is on the original debt, and not on the subsequent promise, *Biscoe v. Stone*, 11 Ark. 33; although it may be set out in the pleading, according to its effect, as a new promise. *Willely v. State*, 105 Ind. 453, 5 N. E. 884. The statutory requirement that an acknowledgment or new promise shall be in writing does not change the effect of a part payment. *Mills v. Davis*, 113 N. Y. 243, 21 N. E. 68; *Lyle v. Esser*, 98 Wis. 234, 73 N. W. 1008.

³⁵⁷ Byles, Bills, 357; *Chit. Bills*, 603; 2 Pars. Notes & B. 656; *Purdon v. Purdon*, 10 Mees. & W. 562; *Bamfield v. Tupper*, 7 Exch. 27; *Hollis v. Palmer*, 2 Bing. N. C. 713; 3 Scott, 265; *Anthony v. Fritts*, 45 N. J. Law, 1; *Sanford v. Hayes*, 19 Conn. 591; *Trustees of Real Estate Bank v. Hartfield*, 5 Ark. 551; *Taylor v. Perry*, 48 Ala. 240; *Koslowski v. Yesler*, 2 Wash. T. 407, 8 Pac. 493. So, too, a payment of interest, tendered to, and released, receipted, and indorsed by, the payee, who said he would present it to his daughter-in-law, the maker's wife, and so wrote her. *Maber v. Maber*, L. R. 2 Exch. 153.

³⁵⁸ *Bealy v. Greenslade*, 2 Crompt. & J. 61; the payment being made within six years, *Trustees of Parsonage Fund in Fryeburg v. Osgood*, 21 Me. 176; so, where the maker paid £1 and said, "This puts us straight for last year's interest, all but 18s.; some day next week I will bring that up," *Evans v. Davies*, 4 Adol. & El. 840.

³⁵⁹ Byles, Bills, 357. But see 2 Pars. Notes & B. 656.

³⁶⁰ 2 Pars. Notes & B. 631; *Nash v. Hodgson*, 6 De Gex, M. & G. 474, reviewing *Bevan v. Gething*, 3 Q. B. 740; *Tlippets v. Hearne*, 1 Crompt. M. & R. 252; *Waters v. Tompkins*, 2 Crompt. M. & R. 723; *Mills v. Fowkes*, 5 Bing. N. C. 453; *Waugh v. Cope*, 6 Mees. & W. 824; *Burn v. Boulton*, 2 C. B. 476.

States a payment has been held to be insufficient under statutes then in force.³⁶¹

A part payment, in general, takes a bill or note out of the statute, whether made before it was barred,³⁶² or afterwards.³⁶³ But a payment made on Sunday will have no such effect.³⁶⁴ And neither a part payment nor an acknowledgment of the debt will bar the statute, if accompanied by words or circumstances showing a contrary intention.³⁶⁵ So, if the payment is not intended to be applied on the note, it cannot be used to take it out of the statute.³⁶⁶

Payment on Collateral—Involuntary.

§ 1622. Where the same debt is secured by different instruments, payment of interest on one will take the others out of the statute.³⁶⁷ And a general payment, applied by the creditor to a note which was not barred at the time, in preference to one that was barred, will take the former out of the statute, although the creditor might have applied the payment to the other note.³⁶⁸ So, if securities are

³⁶¹ *Fairbanks v. Dawson*, 9 Cal. 89, as to a payment made before the statute expired; *Shumate v. Williams*, 34 Ga. 245, under the act of 1856, no longer in force; *Parsons v. Carey*, 28 Iowa, 431; *Harrencourt v. Merritt*, 29 Iowa, 71; *Roberts v. Hammon*, Id. 128; *Anderson v. Robertson*, 24 Miss. 389; *Smith v. Westmoreland*, 12 Smedes & M. (Miss.) 663; *Taylor v. Hendrie*, 8 Nev. 243.

³⁶² *English v. Wathen*, 9 Bush (Ky.) 387. But see, contra, *Emmons v. Overton*, 18 B. Mon. (Ky.) 643.

³⁶³ *Sinnett v. Sinnett*, 82 Me. 278, 19 Atl. 458. And if the time of the indorsement is proved, the payment will be presumed to have been made then. *In re Kellogg*, 104 N. Y. 648, 10 N. E. 152.

³⁶⁴ *Clapp v. Hale*, 112 Mass. 368; *Dennis v. Sharman*, 31 Ga. 607.

³⁶⁵ *Jewett v. Petit*, 4 Mich. 508. E. g. by saying he owed more, but would not pay. *Wainman v. Kynman*, 1 Exch. 118.

³⁶⁶ *Krone v. Krone*, 38 Mich. 661. But where the application of a payment has been disputed, the maker cannot set it up more than six years afterwards against a bona fide holder. *Murphy v. Reedy* (Miss.) 2 South. 167.

³⁶⁷ *Bytes, Bills*, 361; 2 Pars. Notes & B. 662; *Dowling v. Ford*, 11 Mees. & W. 329. And where it revives a note, it will also revive the collateral mortgage. *Schmucker v. Sibert*, 18 Kan. 104. But a note is not revived by a payment credited upon a sale under a collateral mortgage where the land was conveyed to, and the mortgage assumed by, another. *Campbell v. Baldwin*, 130 Mass. 199.

³⁶⁸ *Nash v. Hodgson*, 6 De Gex, M. & G. 474.

assigned to the creditor, to be applied, without special direction, to four notes, he may apply them upon all, so as to take them all out of the statute.³⁶⁹ And where A. makes a note to B., and afterwards lends him money payable on demand, and payments are made by him on the note until it is reduced to an amount which would be extinguished (as he intended) by the loan, the money lent will be available as a set-off in an action upon the note, although it was payable on demand, and had never been demanded, and would have been barred, except for the payments made on the note.³⁷⁰

Only voluntary payments, however, imply a promise to pay the balance of the debt. Thus, the collection of collateral given with the original debt will not affect the statute.³⁷¹ So, a payment of money into court will only take a bill or note out of the statute to the extent of the actual payment.³⁷² So, a payment allowed by the court against the estate of a deceased maker, and indorsed on a note, will not affect the liability of a guarantor.³⁷³ So, a compulsory payment of interest by a judgment does not amount to an acknowledgment of the debt.³⁷⁴ Nor the payment of a dividend by the assignee of an insolvent or bankrupt maker.³⁷⁵ And such dividend made on the original consideration will not bar the statute as to the co-drawer of a bill given and accepted for it.³⁷⁶ And, in general, a dividend from the estate of a

³⁶⁹ Taylor v. Foster, 132 Mass. 30.

³⁷⁰ Perkins v. Coleman, 51 Miss. 298.

³⁷¹ Wolford v. Cook (Minn.) 73 N. W. 706; Moffitt v. Carr, 48 Neb. 403, 67 N. W. 150.

³⁷² Byles, Bills, 357; Chit. Bills, 692; 2 Pars. Notes & B. 660; Reid v. Dickons, 5 Barn. & Adol. 499, 2 Nev. & M. 369; Long v. Greville, 3 Barn. & C. 10, 4 Dowl. & R. 632.

³⁷³ Root v. Bradley, 1 Kan. 437.

³⁷⁴ Morgan v. Rowlands. L. R. 7 Q. B. 493. So, money collected by fl. fa. against the co-obligor of a bond. Disborough v. Bidleman, 20 N. J. Law, 275; Moffitt v. Carr, *supra*.

³⁷⁵ Roscoe v. Hale, 7 Gray (Mass.) 274; Pine River Bank v. Swazey, 47 N. H. 154; Merchants' & M. Bank of Pittsburgh v. Watson, 46 Pa. St. 310. But see, *contra*, Letson v. Kenyon, 31 Kan. 301, 1 Pac. 562, where the note was included in the maker's schedule of creditors, and a dividend was afterwards paid on it by the assignee.

³⁷⁶ Chit. Bills, 688; Brandram v. Wharton, 1 Barn. & Ald. 463; Ex parte Woodward, 3 Mont. & A. 609.

bankrupt maker is not such acknowledgment as to render a co-maker liable.³⁷⁷

Manner of Payment.

§ 1623. The debtor's bill of exchange,³⁷⁸ or promissory note,³⁷⁹ is a sufficient payment, as made at the time of drawing, and not at the time of maturity;³⁸⁰ but if it is given as collateral, to be collected and applied on the debt, it will be a payment when the money is received.³⁸¹ Part payment may also be made by the note of a third person.³⁸² And even an indorsement correcting and reducing the amount will act as a payment.³⁸³

If a payment in Confederate currency is accepted by the creditor, it will bar the statute, as a valid payment.³⁸⁴ So, if a payment is made and received in goods;³⁸⁵ or if the support of a child is paid under

³⁷⁷ Byles, Bills, 360; Chit. Bills, 688; Jackson v. Fairbank, 2 H. Bl. 340. But see Davies v. Edwards, 21 Law J. Exch. 4.

³⁷⁸ Byles, Bills, 356; 2 Pars. Notes & B. 655; Turney v. Dodwell, 3 El. & Bl. 136; Irving v. Veitch, 3 Mees. & W. 90. So, a bill which was paid, coupled with a request to take the balance in horse hire. Walker v. Butler, 6 El. & Bl. 506.

³⁷⁹ Either of the debtor himself, Ilsley v. Jewett, 2 Metc. (Mass.) 168; or of another person, Smith v. Ryan, 66 N. Y. 352; but where a surety gives his note, with an oral condition for suit on the original note and payment of the proceeds to the holder, it is not a new promise to take the original note out of the statute, Gragg v. Barnes, 32 Kan. 301, 4 Pac. 276.

³⁸⁰ Byles, Bills, 356; Chit. Bills, 692; Hart v. Nash, 2 Crompt. M. & R. 337; Hooper v. Stephens, 7 Car. & P. 260, 4 Adol. & E. 71; Irving v. Veitch, 3 Mees. & W. 90. So, a note payable at a distant day, Harper v. Fairley, 63 N. Y. 442; Smith v. Ryan, supra; or a bill collected several years after its date, Gowan v. Forster, 3 Barn. & Adol. 510; so, an agreement to take property in payment is a payment from its date, not from the indorsement on the note, nor from the delivery of the property, Lincoln v. Johnson, 43 Vt. 74.

³⁸¹ Haven v. Hathaway, 20 Me. 345. The money being afterwards collected on it by the debtor as agent of the creditor, and paid over. Whipple v. Blackington, 97 Mass. 476.

³⁸² Buffinton v. Chase, 152 Mass. 534, 25 N. E. 977. But see Whitchev v. McConnell, 59 N. H. 470.

³⁸³ Bouton v. Hill, 4 App. Div. 251, 38 N. Y. Supp. 498.

³⁸⁴ Dupre v. Lumpkin, 28 La. Ann. 584.

³⁸⁵ Hooper v. Stephens, 7 Car. & P. 260, 4 Adol. & E. 71; Hart v. Nash, 2 Crompt. M. & R. 337. Especially when the note was so payable. Clapp v. Ingersol, 11 Me. 83.

an agreement to allow it as a payment of interest on the note.³⁸⁶ So, where the maker suffers the holder to overdraw his account with him to the amount of the interest due on the note.³⁸⁷ So, an indorsement by consent of a credit for overcharges in the original consideration is a sufficient acknowledgment, although not properly a payment.³⁸⁸

Proof of Payment—Indorsement by Debtor.

§ 1624. The payment may now be proved, like any other fact, by parol evidence.³⁸⁹ But it must be proved as a fact by the party relying on it.³⁹⁰ And the fact is for the jury to determine.³⁹¹ It was formerly held that mere verbal admissions by the debtor were not sufficient.³⁹² A verbal acknowledgment is sufficient to prove the appropriation of a payment to the debt in question,³⁹³ as well as to prove the payment. So, an agreement for satisfaction by paying for the support of a child may be proved by evidence of a former settlement and receipt on that basis.³⁹⁴ And the payment of interest on a note may be proved by entries made at the maker's request in the deceased payee's books.³⁹⁵

The indorsement of payment on a note may be a sufficient acknowl-

³⁸⁶ *Bodger v. Arch*, 10 Exch. 333.

³⁸⁷ *In re Baldwin*, 11 App. Div. 551, 42 N. Y. Supp. 642.

³⁸⁸ *Phillips v. Mahan*, 52 Mo. 197. But an offer of the holder (refused by the creditor after refusing payment of the note) to credit on it a charge for a night's lodging is not sufficient. *Kyger v. Ryley*, 2 Neb. 20.

³⁸⁹ *Byles, Bills*, 361; *Cleave v. Jones*, 6 Exch. 573; *Egery v. Decrew*, 53 Me. 392; *Sibley v. Lumbert*, 30 Me. 253. Although not indorsed on the note. *Curtis v. Nash*, 88 Me. 476, 34 Atl. 273; *Henry v. Diviney*, 101 Mo. 378, 13 S. W. 1057.

³⁹⁰ *McGehee v. Greer*, 7 Port. (Ala.) 537; *Bender v. Blessing*, 91 Hun, 73, 36 N. Y. Supp. 162.

³⁹¹ *Gibson v. Peebles*, 2 McCord (S. C.) 418.

³⁹² *Byles, Bills*, 361; *Chit. Bills*, 691; *Willis v. Newham*, 3 Younge & J. 518; *Balldon v. Walton*, 1 Exch. 632; *Waters v. Tompkins*, 2 Crompt. M. & R. 723.

³⁹³ *Byles, Bills*, 361; *Waters v. Tompkins*, *supra*; *Bevan v. Gething*, 3 Q. B. 740; *Balldon v. Walton*, *supra*.

³⁹⁴ *Bodger v. Arch*, 10 Exch. 333.

³⁹⁵ *Bradley v. James*, 13 C. B. 822.

edgment to take it out of the statute;³⁹⁸ but, if made by the holder, it must be shown to have been made before the statute had barred the note.³⁹⁷ And it is sufficient, in the absence of any statute to the contrary, if it is made in the payee's handwriting.³⁹⁸ And, if the indorsement is admissible, the date is presumptive evidence of the time when it was made.³⁹⁹ It must be shown, however, that such indorsement was made by the maker, or with his consent.⁴⁰⁰ And, if no payment was actually made, the statute will not be stayed by an unsigned indorsement of payment.⁴⁰¹ The maker's own indorsement, or other admission of payment, is sufficient proof.⁴⁰² And, if the maker is dead, his signature and handwriting in the indorsement may be proved by parol.⁴⁰³

Indorsement by Holder.

§ 1625. The holder's receipt, indorsed without the maker's knowledge, and without other proof of payment, is insufficient.⁴⁰⁴ And it is now provided in Great Britain, and in many of the United States, that no indorsement or memorandum of payment on a bill or note,

³⁹⁸ *Hopkins v. Stout*, 6 Bush (Ky.) 375; *Carter v. Carter*, 44 Mo. 195. In Georgia it must be signed by the party to be bound. Civ. Code, § 2034; *Obear v. Bank*, 97 Ga. 587, 25 S. E. 335. And the holder cannot sign it as agent for the maker. *Wright v. Bessman*, 55 Ga. 187. An indorsement may apply to several notes written on one sheet. *Sanborn v. Cole*, 63 Vt. 590, 22 Atl. 716.

³⁹⁷ *White v. Beaman*, 85 N. C. 3; *Young v. Perkins*, 29 Minn. 173, 12 N. W. 515; *Mills v. Davis*, 113 N. Y. 243, 21 N. E. 68; *Harding v. Grim*, 25 Or. 506, 36 Pac. 634; *Young v. Alford*, 118 N. C. 215, 23 S. E. 973; *Bailey v. Danforth*, 53 Vt. 504.

³⁹⁸ But the date does not prove payment or indorsement at that time, *Shaffer v. Shaffer*, 41 Pa. St. 51; and the date of the payment, not that of the indorsement, determines the effect, *Young v. Alford*, 118 N. C. 215, 23 S. E. 973; unless otherwise agreed, *Manson v. Lancey*, 84 Me. 380, 24 Atl. 880.

³⁹⁹ *Byles, Bills*, 262; *Chit. Bills*, 693; *Smith v. Battens*, 1 *Moody & R.* 341; *Anderson v. Weston*, 6 Bing. N. C. 296.

⁴⁰⁰ *Boulin v. Rainey*, 21 La. Ann. 335.

⁴⁰¹ *Blanchard v. Blanchard*, 122 Mass. 558.

⁴⁰² *Chandler v. Lawrence*, 3 Mich. 261.

⁴⁰³ *Gordon v. Knox*, 31 La. Ann. 284.

⁴⁰⁴ *Whitney v. Bigelow*, 4 Pick. (Mass.) 110.

written or made by or on behalf of the party to whom the payment is made, "shall be deemed sufficient proof of such payment" to take it out of the statute.⁴⁰⁵ And an indorsement in the writing of the payee is no evidence of payment, without proof that it was made with the knowledge of the maker.⁴⁰⁶ Payment indorsed must be duly proved.⁴⁰⁷ An indorsement in the holder's handwriting is admissible, but must be supported by other evidence.⁴⁰⁸ But an indorsement in the handwriting of a friend, accustomed to act as agent for the maker as well as for the payee, is *prima facie* sufficient.⁴⁰⁹ So, too, an indorsement by the holder at the maker's request.⁴¹⁰ And a receipt for interest, indorsed by the holder to the maker as received from the indorser, will bind the indorser, if he afterwards assents to it on a copy being shown him.⁴¹¹

Part Payment by Joint Maker.

§ 1626. Payment by one maker of a joint or joint and several note stops the running of the statute as to all, where there is no statutory

⁴⁰⁵ 9 Geo. IV. c. 14; ARKANSAS (Sand. & H. Dig. § 4849); COLORADO (Mills' Ann. St. § 2921); INDIANA (Horner's Rev. St. § 303); MAINE (Rev. St. c. 81, § 100); MASSACHUSETTS (Pub. St. c. 197, § 16); MICHIGAN (How. Ann. St. § 8729); NEW JERSEY (2 Gen. St. p. 1976, § 18); VERMONT (V. S. § 1216); WISCONSIN (Sanb. & B. Ann. St. § 4247). So, *Rogers v. Anderson*, 40 Mich. 200; *Hulbert v. Nichol*, 20 Hun (N. Y.) 454; *Davidson v. Delano*, 11 Allen (Mass.) 523; *Concklin v. Pearson*, 1 Rich. Law (S. C.) 391; *Parker v. Butterworth*, 46 N. J. Law, 244; *Cleaveland v. Dinsmore*, 59 Vt. 436, 8 Atl. 279, as to law of Maine; *Green v. Hall*, 36 Ga. 538; *George v. Gardner*, 49 Ga. 441; *Schlottfeldt v. Bull*, 18 Wash. 64, 50 Pac. 560; *Davidson v. Harrison*, 33 Miss. 41; especially when there was other evidence tending to show it was not indorsed *bona fide*, *Chambers v. Walker*, 4 Rich. Law (S. C.) 548; so, where the signature was by a mark, and the rest of the indorsement was in the holder's handwriting, *Eastwood v. Saville*, 9 Mees. & W. 615.

⁴⁰⁶ *Davidson v. Delano*, 11 Allen (Mass.) 523; *Connelly v. Pierson*, 9 Ill. 108.

⁴⁰⁷ *Snyder v. Winsor*, 44 Mich. 140, 6 N. W. 197.

⁴⁰⁸ *Clapp v. Ingersol*, 11 Me. 83.

⁴⁰⁹ *Briggs v. Wilson*, 17 Beav. 330.

⁴¹⁰ *Sibley v. Phelps*, 6 Cush. (Mass.) 172. So, an indorsement by the payee's agent at the request and in the presence of the maker and surety. *Green v. Juhan*, 66 Ga. 531.

⁴¹¹ *Huntington v. Ballou*, 2 Lans. (N. Y.) 120.

provision to the contrary.⁴¹² And such payment by one is available in an action brought against the other.⁴¹³ In like manner, a credit, given to one maker on his individual account with the holder, for interest paid on the note, is equivalent to a cash payment.⁴¹⁴ The payment by one maker, A., will bind his co-maker, B., although made after the death of another co-maker, C.⁴¹⁵ So, payment by a maker, who has died before suit brought, may be proved by an indorsement in his handwriting, and an admission by the other maker as against the latter.⁴¹⁶ And if a joint note is made by A., B., and C., and B. becomes A.'s executor and pays the interest after A.'s death, it will bar the statute as to A.'s estate, whether made by B. individually or as executor.⁴¹⁷ So, a sealed note may be kept alive by a part payment by the assignee of one insolvent maker.⁴¹⁸

Where the note is a partnership note, a payment of interest by one partner after dissolution of the partnership, but before the note is barred, will take it out of the statute as to the other makers,⁴¹⁹ pro-

⁴¹² Byles, Bills, 358; Chit. Bills, 687; *Perham v. Raynal*, 2 Bing. 306, 9 Moore, 566; *Dowling v. Ford*, 11 Mees. & W. 329; *Pease v. Hirst*, 10 Barn. & C. 122; *Anthony v. Fritts*, 45 N. J. Law, 1; *Turner v. Ross*, 1 R. I. 88; *Davis v. Coleman*, 29 N. C. 424; *Patch v. King*, 29 Me. 448; *Lincoln Academy v. Newhall*, 38 Me. 179; *Partlow v. Singer*, 2 Or. 307; whether made after the note was barred, *Channell v. Ditchburn*, 5 Mees. & W. 494; or before, *Craig v. Callaway Co. Court*, 12 Mo. 94; *Colburn v. Averill*, 30 Me. 310; and although the payor was principal and his co-maker a surety only, *Whitaker v. Rice*, 9 Minn. 13 (Gil. 1); and although it does not appear by whom the payment was made (the burden being on the party setting up the statute to prove that he is discharged by it), *Vore v. Woodford*, 29 Ohio St. 245; but if the payment is made by A. after the note is barred as to B., it has been held that their joint liability is at an end, and B. is not affected by the payment, *Parker v. Butterworth*, 46 N. Y. Law, 244.

⁴¹³ *Whitcomb v. Whiting*, Doug. 652; *Bland v. Haselrig*, 2 Vent. 151. Although made fraudulently. *Goddard v. Ingram*, 3 Q. B. 839. So, payment on a partnership note. *Mix v. Shattuck*, 50 Vt. 421. But see, contra, as to payment under a compromise by one partner, *Turner v. Ross*, 1 R. I. 88.

⁴¹⁴ Chit. Bills, 692; *Manderston v. Robertson*, 4 Man. & R. 440.

⁴¹⁵ *Corlies v. Fleming*, 30 N. J. Law, 349.

⁴¹⁶ *Burgoon v. Bixler*, 55 Md. 384.

⁴¹⁷ *Griffin v. Ashby*, 2 Car. & K. 139. But see § 1628, *infra*.

⁴¹⁸ *Belo v. Spach*, 85 N. C. 122.

⁴¹⁹ *Casebolt v. Ackerman*, 46 N. J. Law, 169; *Merritt v. Day*, 38 N. J. Law, 32; *Houser v. Irvine*, 3 Watts & S. (Pa.) 345.

vided that the holder had had previous dealings with the firm, and had no notice of the dissolution.⁴²⁰ And this has been held to be true as against B.'s estate, where A. and B. gave their partnership bond, and afterwards, on dissolution of the firm, A. assumed the debts and gave security to B., and after B.'s death gave his individual bond, and became bankrupt before it was paid.⁴²¹

§ 1627. But in some of the United States, as in Great Britain, the rule as to payment by a party jointly liable on the bill or note has been changed by the statute so as to leave one debtor unaffected by a payment made by his co-debtor.⁴²² In such case a maker will not continue liable by reason of a set-off claimed by his co-maker, and indorsed as a payment after the note became barred by agreement of such maker with the payee.⁴²³ And, especially if the payment is made and indorsed by one maker on his individual account, he cannot afterwards set up that it was made on the joint account, after the holder has relied on the indorsement, and suffered the note to become outlawed as to the other maker.⁴²⁴ Under these statutes, it makes no difference whether the payment by the co-maker is made

⁴²⁰ *Sage v. Ensign*, 2 Allen (Mass.) 245; *Tappan v. Kimball*, 30 N. H. 136. So, where the partner defendant has admitted that the note should have been paid long ago by the other partner. *Walton v. Robinson's Adm'r*, 27 N. C. 341. But the burden is on the holder to show that it was made for the partnership. *Wood v. Barber*, 90 N. C. 76; and on the note in question, *Holme v. Green*, 1 Starkie, 488.

⁴²¹ *Heath v. Percival*, 1 P. Wms. 682.

⁴²² *Shutts v. Fingar*, 100 N. Y. 539, 3 N. E. 588; *Hulbert v. Nichol*, 20 Hun (N. Y.) 454; *Coleman v. Fobes*, 22 Pa. St. 156; *Clark v. Burn*, 86 Pa. St. 502; *Lazarus v. Fuller*, 89 Pa. St. 331; *Balcom v. Richards*, 6 Cush. (Mass.) 360; *Holcomb v. Sloan*, 39 Mich. 173; *Rogers v. Anderson*, 40 Mich. 290; *Hance v. Halr*, 25 Ohio St. 349; *Miller v. Miller*, *MacArthur & M.* (D. C.) 109; *Biscoe v. Jenkins*, 10 Ark. 108; *Boynton v. Spafford*, 162 Ill. 113, 44 N. E. 379; *Willoughby v. Irish*, 35 Minn. 63, 27 N. W. 379; *Oleson v. Wilson*, 20 Mont. 544, 52 Pac. 372; *First Nat. Bank of Miles City v. Bullard*, 20 Mont. 118, 49 Pac. 658; *Parker v. Butterworth*, 46 N. J. Law, 244; *Bender v. Blessing*, 82 Hun, 320, 31 N. Y. Supp. 481; *Martin v. Hyde*, 19 App. Div. 490, 46 N. Y. Supp. 613. And in Maine even a partner is not bound by the payment of his partner and co-maker after the note is barred. *True v. Andrews*, 35 Me. 183.

⁴²³ *Hubbard v. Insurance Co.*, 25 Kan. 172.

⁴²⁴ *Tainter v. Winter*, 53 Me. 348.

in the defendant's absence or in his presence,⁴²⁵ or even by the hands of the defendant,⁴²⁶ although it will be binding on him, if made by his direction,⁴²⁷ or by the other as agent for him.⁴²⁸

Payment by Survivor—Executor.

§ 1628. After the joint liability has been determined by the death of one party, a payment by the survivor will not take the bill or note out of the statute, as against the personal representatives of the deceased debtor.⁴²⁹ And, e converso, a payment by the executor of a deceased maker will not affect the liability of the survivor.⁴³⁰ But a part payment made by one maker before the death of his co-maker, and binding upon the latter at that time, will be binding upon his executor after his death.⁴³¹ In Maryland, however, the payee is not a competent witness to render the surviving maker liable by proving a payment made and indorsed by his deceased co-maker to take the note out of the statute.⁴³²

The maker's executor may bind his estate by payment of the interest on a note.⁴³³ But part payment by a surviving joint maker,

⁴²⁵ In his absence. *Whipple v. Stevens*, 22 N. H. 219. Or in his presence. *Quimby v. Putnam*, 28 Me. 419.

⁴²⁶ *Bailey v. Corliss*, 51 Vt. 306. So, if made by an order on one maker payable to the other at the request of a third party, although to be indorsed on the note. *Cowling v. Vincent*, 29 U. C. Q. B. 427.

⁴²⁷ *Haught v. Avery*, 16 Hun (N. Y.) 252.

⁴²⁸ *Creighton v. Allen*, 26 U. C. Q. B. 627. But one maker does not ratify the payment by another by his own subsequent promise to pay the balance. *Pfenninger v. Kokesch*, 68 Minn. 81, 70 N. W. 867.

⁴²⁹ *Byles*, Bills, 359; *Chit. Bills*, 687; 2 *Pars. Notes & B.* 659; *Atkins v. Tredgold*, 2 Barn. & C. 23, 3 Dowl. & R. 200. So, a fortiori, where the survivor is the principal and the deceased joint maker was a surety only. *Lane v. Doty*, 4 Barb. (N. Y.) 530.

⁴³⁰ *Byles*, Bills, 359; *Chit. Bills*, 691; 2 *Pars. Notes & B.* 659; *Slater v. Lawson*, 1 Barn. & Adol. 396; *Smith v. Townsend*, 9 Rich. Law (S. C.) 44. So, as to payment by administrator. *Hathaway v. Haskell*, 9 Pick. (Mass.) 42. But see, contra, in Oregon, under the construction given to the statute there. *Sutherland v. Roberts*, 4 Or. 378.

⁴³¹ *Burleigh v. Stott*, 8 Barn. & C. 36, 2 Man. & R. 93.

⁴³² *Miller v. Motter*, 35 Md. 428.

⁴³³ *Fordham v. Wallis*, 10 Hare. 217. So, a payment by an agent of the maker's executor out of the executor's own property, under directions to

as such, will not bind the estate of his co-maker, although he is the executor of that estate.⁴³⁴ And the holder who relies on such payment, as against the estate of a deceased maker, must prove that the payment was made by the executor as such.⁴³⁵ And, if the note is already barred at the maker's death, it cannot be revived as against his estate by a subsequent payment by his executor or administrator.⁴³⁶

Payment by Indorser—Surety—Agent.

§ 1629. A part payment by an indorser does not take a note out of the statute as against the maker.⁴³⁷ And a part payment by the maker will not render the indorser liable.⁴³⁸ But payment by a principal will bind his surety.⁴³⁹ But the contrary has been held in some states.⁴⁴⁰ And payment made by the surety on his own ac-

apply it to the debts of the maker. *Heath v. Grenell*, 61 Barb. (N. Y.) 190. But see, *contra*, as to payment by an administrator on a note which has not been proved against the state. *Cox v. Phelps* (Ark.) 45 S. W. 990.

⁴³⁴ *Thompson v. Walthman*, 26 Law J. Ch. 134; such payment being made *prima facie* as maker, and not as executor.

⁴³⁵ *Byles, Bills*, 359; *Scholey v. Walton*, 12 Mees. & W. 510; *Griffin v. Ashby*, 2 Car. & K. 139.

⁴³⁶ *McLaren v. McMartin*, 36 N. Y. 88.

⁴³⁷ *Byles, Bills*, 358; *Harding v. Edgecumbe*, 28 Law J. Exch. 313.

⁴³⁸ *Hunter v. Robertson*, 30 Ga. 479; *Maddox v. Duncan* (Mo. Sup.) 45 S. W. 688. So, the indorsement of a set-off for the maker against the indorsee will not bind the indorser. *Woodhouse v. Simmons*, 73 N. C. 30.

⁴³⁹ *Wyatt v. Hodson*, 8 Blng. 309; *Hunt v. Bridgham*, 2 Pick. (Mass.) 581; *Sigourney v. Drury*, 14 Pick. (Mass.) 387; *Zent's Ex'rs v. Heart*, 8 Pa. St. 337; *Joslyn v. Smith*, 13 Vt. 353. So, if the surety was present and asked for no restriction of its effect. *Glick v. Crist*, 37 Ohio St. 388. And see § 924, *supra*. But not a payment by the principal after the note is barred. *Smith v. Caldwell*, 15 Rich. Law (S. C.) 365.

⁴⁴⁰ *Kallenbach v. Dickinson*, 100 Ill. 427; *McMillan v. Leeds*, 58 Kan. 815, 49 Pac. 159; even on a joint note of principal and surety. *Goudy v. Gillam*, 6 Rich. Law (S. C.) 28. So, now, by statute. *Faulkner v. Bailey*, 123 Mass. 588; Rev. St. c. 120, §§ 13-17. And it is a question for the jury whether one maker is surety for the other, or partner. *Ellinger's Appeal*, 114 Pa. St. 505, 7 Atl. 180. So, payment by the principal maker of a joint and several note has been held not to bar the statute as to his surety and co-maker. *Burleigh v. Stott*, 8 Barn. & C. 36, 2 Man. & R. 93.

count will render him liable,⁴⁴¹ but not if it is made as agent for the principal.⁴⁴² On the other hand, it has been held that a payment made by a surety will not revive a note that is already barred, as against the principal.⁴⁴³

If the payment is made for any party by his authority or at his request, it will take the note out of the statute, as though made by himself.⁴⁴⁴ But he will not be bound, if the agent exceeds his authority in making the payment.⁴⁴⁵ And drawing a bill on the agent for a part payment will not authorize him to bind the principal by his payment as an acknowledgment of the balance of the debt.⁴⁴⁶ So, payment by a wife will not bind her husband as an acknowledgment of the debt, unless her authority as his agent is shown.⁴⁴⁷ But payment on a note by a church vestry,⁴⁴⁸ or by the treasurer of an unincorporated society,⁴⁴⁹ will bind the principal maker.

Payment—To Whom Made.

§ 1630. Payment to an administrator, under void letters of administration, will take a note out of the statute, in favor of an administrator afterwards appointed by valid letters.⁴⁵⁰ So, too, a pay-

⁴⁴¹ *Green v. Morris*, 58 Vt. 35, 4 Atl. 561. Although paid by an order of the maker on the surety. *Long v. Miller*, 93 N. C. 233.

⁴⁴² Even though the agency was not disclosed at the time. *Holmes v. Durell*, 51 Me. 201.

⁴⁴³ *Jones v. Jones*, 23 Ark. 212. But see, contra, where the payment was made in the presence of the principal. *Whipple v. Stevens*, 22 N. H. 219.

⁴⁴⁴ *Burleigh v. Stott*, 8 Barn. & C. 36; *Pease v. Hirst*, 10 Barn. & C. 122; *Bealy v. Greenslade*, 2 Crompt. & J. 61. But there is no implied power in the maker's widow to bind his heirs by a part payment. *Ætna Life Ins. Co. v. McNeely*, 166 Ill. 540, 46 N. E. 1130. Nor in a corporation by part payment to bind stockholders who have signed for its accommodation. *Patterson v. Collier* (Mich.) 71 N. W. 327.

⁴⁴⁵ *Linsell v. Bonsor*, 2 Bing. N. C. 241, 2 Scott, 399. So, where the principal had already expressly refused payment. *Galpin v. Barney*, 37 Vt. 627.

⁴⁴⁶ *Hyde v. Johnson*, 2 Bing. N. C. 776, 3 Scott, 289.

⁴⁴⁷ *Neve v. Hollands*, 18 Q. B. 262. And see § 318, *supra*; *Waters v. Tompkins*, 2 Crompt., M. & R. 723, 1 Tyrw. & G. 137.

⁴⁴⁸ *Crew v. Petit*, 3 Nev. & M. 456, 1 Adol. & E. 196.

⁴⁴⁹ *Walker v. Wait*, 50 Vt. 668.

⁴⁵⁰ *Byles, Bills*, 361; *Chit. Bills*, 693; *Clark v. Hooper*, 10 Bing. 480, 4 Moore & S. 353.

ment made to a cestui que trust, in favor of the trustee to whom the note was payable.⁴⁵¹ But a payment to one joint holder of his separate share of the debt will not take the note out of the statute as to the other holder.⁴⁵²

⁴⁵¹ Chit. Bills, 693; Megginson v. Harper, 2 Crompt. & M. 322, 4 Tyrw. 94.

⁴⁵² Whitcher v. McConnell, 59 N. H. 470.

II. PARTIES TO ACTION.

- § 1631. Who may Sue—American Statutes.
1632. Action by Payee—Joint Payees.
1633. Action by Indorsee.
1634. — In What Name.
1635. — Sufficiency of Indorsement.
1637. — In United States Courts.
1638. Action by Pledgee.
1639. — By Assignee.
1641. — By Drawer.
1642. — By Executor—Heir.
1643. Action by Indorser.
1644. — Indorsement Canceled.
1645. — Indorsement Uncanceled.
1647. Action by Surety—Joint Debtor.
1648. — By Bearer.
1649. Action by Owner.
1650. — Holder without Title.
1651. — "Party in Interest."
1652. — Transfer Pendente Lite.
1653. — Without Indorsement.
1655. — Discount Refused by Payee.
1656. — Title without Possession.
1657. Action by Agent—Collecting Agent.
1659. — By Trustee.
1660. — By Government—Party under Disability.
1661. — Against Parties Severally.
1662. — Against Indorser—Surety—Diligence.
1663. — Against Drawer.
1664. — Against Acceptor—Drawee.
1665. — Against Joint Debtors.
1667. — Against Joint and Several Debtors.
1668. — Against Joint Debtor Surviving.
1669. — Against Several Debtors—Jointly.
1671. Plaintiff and Defendant Identified.
1672. Action against Stranger.

Who May Sue—American Statutes.

§ 1631. It is provided in many of the United States that every action must be prosecuted in the name of the real party in interest,⁴⁵³

⁴⁵³ ARKANSAS (Sand. & H. Dig. § 5623); CALIFORNIA (Code Civ. Proc. § 367); INDIANA (Horner's Rev. St. § 251); KANSAS (Gen. St. c. 95, § 20); (2326)

or by the party having the legal title.⁴⁵⁴ Others provide that action may be brought by the payee⁴⁵⁵ or indorsee⁴⁵⁶ of a negotiable note, as on a bill. And if a note or other instrument is made payable to a person who is dead at the time, or to several persons, of whom one is dead, the suit may be brought by his personal representative, or by the survivors, as the case may be.⁴⁵⁷ In some states it is expressly provided that the holder of a bill or note payable to bearer may sue in his own name without indorsement,⁴⁵⁸ and that the bearer may sue on a note payable to the maker's order or to a fictitious person.⁴⁵⁹ In some states any assignee of a bill or note may bring suit in his own name.⁴⁶⁰ And in many states it is provided

MISSOURI (Rev. St. § 1900); NEBRASKA (Comp. St. § 5618); NEVADA (Gen. St. § 3026); OHIO (Bates' Ann. St. § 4903); OREGON (Code Civ. Proc. § 27); SOUTH CAROLINA (Code Civ. Proc. § 132); WISCONSIN (Sanb. & B. Ann. St. § 2605). So, in NEW YORK (Code Civ. Proc. § 449) and IOWA (Code, § 3459), except that an executor or administrator, a trustee of an express trust, or a person duly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted; a person with whom or in whose name a contract is made for the benefit of another being a trustee of an express trust within the meaning of this section.

⁴⁵⁴ As to contracts, in general. GEORGIA (Civ. Code, § 4939); or, as to bills of exchange, notes payable at bank or other designated place, and other commercial instruments, ALABAMA (Code, § 2594).

⁴⁵⁵ IOWA (Code, § 3043); MICHIGAN (How. Ann. St. § 1579); MISSOURI (Rev. St. § 734); OREGON (Hill's Ann. Laws, § 3190); SOUTH CAROLINA (1 Rev. St. § 1393); RHODE ISLAND (Gen. Laws, c. 166, § 6); WISCONSIN (Sanb. & B. Ann. St. § 1678).

⁴⁵⁶ NORTH CAROLINA (Code, § 41); MICHIGAN (How. Ann. St. § 1579); MISSOURI (Rev. St. § 734); SOUTH CAROLINA (1 Rev. St. § 1393). For other statutes, see § 738, *supra*. And in NEW YORK the payee and indorsees of any note to order, and the holder of any note to bearer, may sue as on inland bills. 2 Rev. St. p. 768, § 4. An indorsee may sue on a note, if it is negotiable where it was made and indorsed, although not by the *lex fori*. *Bowne v. Olcott*, 2 Root (Conn.) 353; *Goff v. Billingham*, Id. 527.

⁴⁵⁷ KENTUCKY (Ky. St. § 477); WEST VIRGINIA (Code, c. 99, § 12).

⁴⁵⁸ VERMONT (V. S. § 2307); ILLINOIS (Hurd's Rev. St. c. 98, § 8); IOWA (Code, § 3043); MISSOURI (Rev. St. § 734); NEW YORK, *supra*; OREGON (Hill's Ann. Laws, § 3190); WISCONSIN (Sanb. & B. Ann. St. § 1678).

⁴⁵⁹ NEW YORK (2 Rev. St. p. 768, § 5); MINNESOTA (Gen. St. § 2236). As against the maker and all persons having knowledge. MICHIGAN (How. Ann. St. § 1580).

⁴⁶⁰ CALIFORNIA (Code Civ. Proc. § 368); DELAWARE (Rev. Code, c. 63, § 8); ILLINOIS (Hurd's Rev. St. c. 98, § 5); INDIANA (Horner's Rev. St. §

that any party may sue or be sued by the initials, name, or description by which he is designated in the instrument.⁴⁶¹ Provision is also made in some states for action by sureties and indorsers for exoneration or contribution, or for other relief.⁴⁶²

Action by Payee—Joint Payees.

§ 1632. The party entitled to sue upon a bill or note may be designated either (1) in the instrument itself by name, or (2) by his possession, or (3) by other proof of real ownership, with or without the evidence of the instrument itself. In general, the party entitled to sue upon a bill or note is to be looked for in the instrument as the designated payee.⁴⁶³ But, where the plaintiff's name is apparently that which the instrument designates, it may be shown by parol that his initials are different, as tending to show that a different person was intended.⁴⁶⁴ If the payee's name is left blank, the holder may fill in the blank with his own name, and sue as payee.⁴⁶⁵ If a note is made to "the heirs of A.," who is then living, the persons intended may bring suit.⁴⁶⁶ And it has even been held that the heirs of A. may accept, and sue in the executor's name on a note made payable to the executor of A.⁴⁶⁷

5502); IOWA (Code, § 3044); NEW JERSEY (2 Gen. St. p. 2536, § 21); MISSISSIPPI (Ann. Code, § 3503); RHODE ISLAND (Gen. Laws, p. 494, § 71); SOUTH CAROLINA (1 Rev. St. § 1303); VIRGINIA (Code, § 2860); WEST VIRGINIA (Code, c. 99, § 14). So, in TEXAS (Rev. St. arts. 307, 309), whether negotiable or not. And in NORTH CAROLINA the assignee even of a sealed note can sue, if his assignor could do so (Code, § 41).

⁴⁶¹ NEW JERSEY (2 Gen. St. p. 2537, § 28); IOWA (Code, § 3473); KANSAS (Gen. St. c. 115, § 19); MISSISSIPPI (Ann. Code, § 674); NEBRASKA (Comp. St. § 5613); OHIO (Bates' Ann. St. § 5010); TENNESSEE (Shannon's Code, § 4485).

⁴⁶² By an indorser, MISSISSIPPI (Ann. Code, § 3276); or surety, *Id.*; DELAWARE (Rev. St. c. 65, § 1). And in GEORGIA a surety or indorser may bring attachment for his protection, before he has paid the note or bill (Civ. Code, § 2979).

⁴⁶³ See § 156, *supra*.

⁴⁶⁴ *Simons v. Watterman*, 17 Ill. 371.

⁴⁶⁵ 2 Daniel, Neg. Inst. 231; 2 Pars. Notes & B. 448; *Crutchley v. Clarence*, 2 Maule & S. 90.

⁴⁶⁶ *Bacon v. Fitch*, 1 Root (Conn.) 181. And see § 152, *supra*.

⁴⁶⁷ *Turnbull v. Freret*, 5 Mart. N. S. (La.) 703.

Where a bill or note is made payable to several persons, all must join in the action; e. g. all the members of the firm named as payee.⁴⁶⁸ Even one who has been held out as a partner, and believed by the maker to be such, should join in an action on a note payable to the supposed firm, although he is merely a clerk of the real payee.⁴⁶⁹ If a note is made payable to A. & Co., A. cannot recover alone, without proof that he is the sole person interested;⁴⁷⁰ e. g. that the firm name is his business name.⁴⁷¹ It has been held, however, that, where a note is payable to a firm by name, the partners, who constitute it at the time the action is brought, may bring suit, as the real parties in interest, although the firm had other members at the time the note was made.⁴⁷² If a fractional interest in a note is assigned to one of the payee's next of kin, and the maker settles with the other parties interested, and thereby severs their joint interest, the assignee may bring suit alone for his share.⁴⁷³ If a note is payable to several jointly, action may be brought by the survivors on the death of one.⁴⁷⁴ If it is made by A. and B. to B. and C., C. may bring suit as on a note made by A. to him.⁴⁷⁵ If payable to A. or B., either or both of them may sue.⁴⁷⁶ The payee is, in general, presumed to be the owner, if the instrument is in his possession.⁴⁷⁷

⁴⁶⁸ 2 Daniel, Neg. Inst. 219.

⁴⁶⁹ Guidon v. Robson, 2 Camp. 302.

⁴⁷⁰ Benj. Chalm. Dig. art. 142; 2 Pars. Notes & B. 440; Robb v. Bailey, 13 La. Ann. 457.

⁴⁷¹ Ferguson v. King, 5 La. Ann. 642.

⁴⁷² Whitlock v. McKechnie, 1 Bosw. (N. Y.) 427. So, where a new firm, continuing the name of the old firm, takes the note with other assets, but without indorsement. Pease v. Hirst, 10 Barn. & C. 122.

⁴⁷³ Pratt v. Pratt, 22 Minn. 148; or after payment of one-half by each of two payees, and after recovery by the other of his half on the note, McGregory v. McGregory, 107 Mass. 543.

⁴⁷⁴ Allen v. Tate, 58 Miss. 585; although the defendant alleged that it belonged to the deceased partner in his individual capacity, Smyth v. Hawthorn, 3 Rawle (Pa.) 355. So, if a note is made to husband and wife, and the wife survives, the husband's executor cannot sue for it. Draper v. Jackson, 16 Mass. 470.

⁴⁷⁵ Quisenberry v. Artis, 1 Duv. (Ky.) 30. But see § 403, supra; also, § 1671, infra.

⁴⁷⁶ Westgate v. Healy, 4 R. I. 523. And see § 155, supra.

⁴⁷⁷ Although indorsed by a third party. Todman v. Purdy, 5 Nev. 238.

And the maker cannot deny him to be the real party in interest required by the statute.⁴⁷⁸

Action by Indorsee.

§ 1633. An indorsee may sometimes sue, although the indorser could not, as in the case where he is himself one of the makers,⁴⁷⁹ or executor of the deceased maker.⁴⁸⁰ So, where he holds as indorsee of a foreign administrator.⁴⁸¹ And the drawee may become an indorsee, and bring suit as such against the drawer and payee, after himself discounting the bill.⁴⁸² The indorsee may strike out prior indorsements, and sue under any previous blank indorsement.⁴⁸³ So, where a note is indorsed by the payee, A., to B., and reindorsed to A., and afterwards delivered by him to the plaintiff, he may sue as B.'s indorsee or (striking out the indorsement to B.) as indorsee of A.⁴⁸⁴ So, he may prove a special indorsement to himself from the payee, although he has averred that the note was indorsed in blank to B., and by B. to the payee, and by the payee to him.⁴⁸⁵

Suit may also be brought by the indorsee for the use of the payee.

So, although the defendant set up ownership in another, who had neither indorsement nor possession. *Ball v. Silver*, 17 Ind. 539.

⁴⁷⁸ *Blacker v. Dunbar*, 108 Ind. 217, 9 N. E. 104. So, too, where the plaintiff is payee of the note and mortgagee in a collateral mortgage. *French v. Blanchard*, 16 Ind. 143.

⁴⁷⁹ *Byles*, Bills, 43; 2 *Daniel*, Neg. Inst. 220, 415; 2 *Pars. Notes & B.* 440; *Morley v. Culverwell*, 7 Mees. & W. 174; *Steele v. Harmer*, 14 Mees. & W. 831, 4 Exch. 1; *Smith v. Lusher*, 5 Cow. 688; *Sherwood v. Barton*, 36 Barb. (N. Y.) 284; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; *Hapgood v. Watson*, 65 Me. 510; *Davis v. Briggs*, 39 Me. 304; *Woodman v. Boothby*, 66 Me. 389; *Willis v. Neal*, 39 Ala. 464; *Smith v. Gregory*, 75 Mo. 121. See, too, §§ 153, 404. But it has been held that the assignee of such note without indorsement can only sue the makers in equity, *Davis v. Merrill*, 51 Mich. 480, 16 N. W. 864; for contribution, *Stevens v. Hannan*, 86 Mich. 305, 48 N. W. 951.

⁴⁸⁰ 2 *Pars. Notes & B.* 441.

⁴⁸¹ *Abercrombie v. Stillman*, 77 Tex. 589, 14 S. W. 196.

⁴⁸² *Swope v. Ross*, 40 Pa. St. 186.

⁴⁸³ 2 *Daniel*, Neg. Inst. 233; *Rand v. Dovey*, 83 Pa. St. 280. And it is immaterial that the intervening indorsement is under the seal of a corporation. And see §§ 715, 716, *supra*.

⁴⁸⁴ *Emerson v. Cutts*, 12 Mass. 78.

⁴⁸⁵ *Martin v. Warren*, 11 Ark. 285.

where it is not otherwise provided by statute.⁴⁸⁶ And he may sue as indorsee, although the note was at the time of the indorsement to him in the possession of another as pledgee from his indorser.⁴⁸⁷ But he cannot bring suit while the note is in the pledgee's possession.⁴⁸⁸

An indorsee may sue the maker in an action of debt.⁴⁸⁹ So, he may bring suit against a surety upon a note made to secure future advances by the payee "and others to whom he may indorse for that purpose," where the note was actually indorsed by the payee to him, and the advances were made by him.⁴⁹⁰ An indorsee cannot, however, sue the drawer of a draft upon the original consideration.⁴⁹¹

Action in What Name.

§ 1634. An indorsee may sue, in general, in his own name,⁴⁹² and not in the name of his indorser.⁴⁹³ He cannot, at least, use the indorser's name without his consent, unless the paper is nonnegotiable.⁴⁹⁴ But it will be sufficient if the consent is given pending suit.⁴⁹⁵ In like manner, the payee may recover judgment in the indorsee's name upon consent given by the indorsee pending the

⁴⁸⁶ *Walker v. Wait*, 50 Vt. 668; the note being subject in such case to the same defense as though the suit were brought by the payor, *Barnett v. Logue's Adm'rs*, 29 Tex. 282.

⁴⁸⁷ *Fisher v. Bradford*, 7 Me. 28.

⁴⁸⁸ *Felton v. Smith*, 84 Ind. 485.

⁴⁸⁹ *Camp v. Bank*, 10 Watts (Pa.) 130; although the indorsee took the note up after judgment, *Howell v. McCracken*, 87 N. C. 390.

⁴⁹⁰ *Dulles v. De Forest*, 19 Conn. 190.

⁴⁹¹ *Battle v. Colt*, 19 Barb. (N. Y.) 68.

⁴⁹² *Kirkman v. Hamilton*, 6 Pet. 20, by statute in NORTH CAROLINA. And see other statutes, *supra*. § 1631. And an indorsement after maturity will support an action in the indorsee's name. *Kyner v. Shower*, 13 Pa. St. 444.

⁴⁹³ *Bowie v. Duvall*, 1 Gill & J. (Md.) 175; *Jordan v. Thornton*, 7 Ark. 224. On the other hand, after payment by an indorser, a suit already begun by the indorsee may be continued in his name for the indorser's benefit. *Mechanics' Bank v. Hazard*, 13 Johns. (N. Y.) 333.

⁴⁹⁴ *Mosher v. Allen*, 16 Mass. 451.

⁴⁹⁵ *Lewis v. Hodgdon*, 17 Me. 267. It is for the jury to decide whether the indorser gave plaintiff permission to use its name, and such permission may be implied. *Lime Rock Bank v. Macomber*, 29 Me. 564.

suit.⁴⁹⁶ And a plea resisting such action must deny knowledge on the indorsee's part, as well as ratification by him.⁴⁹⁷

The indorsement of nonnegotiable paper implies power to bring suit in the indorser's name,⁴⁹⁸ and, in general, suit upon nonnegotiable paper must be brought in the name of the payee,⁴⁹⁹ although in some states provision is made by statute enabling the indorsee to sue in his own name.⁵⁰⁰ And, if a note is negotiable by statute (e. g. being made negotiable at a bank), the indorser may bring suit in his own name, although it is not in terms payable to the "order" of the payee.⁵⁰¹

What Indorsement Sufficient.

§ 1635. To authorize suit by an indorsee, he must hold under a sufficient indorsement. And an indorsement made after suit begun is not sufficient,⁵⁰² although the bill was actually delivered before the commencement of the suit.⁵⁰³ So, if judgment is rendered against the maker, and the note is then taken up by the indorser, and subsequently transferred to another indorsee, the latter cannot bring suit as an ordinary indorsee against the maker.⁵⁰⁴ But one who takes a note by indorsement after maturity may sue upon it as indorsee.⁵⁰⁵

If the indorsement is to several, they are joint holders, and must sue jointly as such. And it has been held in such case that an indorse-

⁴⁹⁶ *Richardson v. Lincoln*, 5 Metc. (Mass.) 201.

⁴⁹⁷ *Harpham v. Haynes*, 30 Ill. 405.

⁴⁹⁸ 2 Pars. Notes & B. 453. As to the transfer of nonnegotiable instruments and suit upon them, see §§ 655, 656, *supra*.

⁴⁹⁹ *Barriere v. Nairac*, 2 Dall. (U. S.) 249; *Matlack v. Hendrickson*, 13 N. J. Law, 263; *Noland v. Ringgold*, 3 Har. & J. (Md.) 216.

⁵⁰⁰ *Goodman v. Fleming*, 57 Ga. 350. So, on a sealed note, *Lamkin v. Nye*, 43 Miss. 241.

⁵⁰¹ *Muir v. Jenkins*, 2 Cranch, C. C. 18, Fed. Cas. No. 9,903.

⁵⁰² And he cannot obviate the difficulty by changing a special indorsement to another into a blank indorsement. *Bank of U. S. v. Moore*, 3 Cranch, C. C. 330, Fed. Cas. No. 930. See, too, § 684, *supra*.

⁵⁰³ *Dowell v. Brown*, 13 Smedes & M. (Miss.) 43. For transfer after maturity, see § 673, *supra*.

⁵⁰⁴ *Prest v. Vanarsdalen*, 11 N. J. Law, 194.

⁵⁰⁵ *Lyman v. Sherwood*, 20 Vt. 42.

ment by one of them to the other will not be sufficient to support an action by the latter.⁵⁰⁶ If, however, the original indorsement is to several as trustees, and one transfers his interest to the other two, they may bring suit without joining him.⁵⁰⁷ So, if the note is indorsed to a firm, and afterwards indorsed in blank by one of the partners in the firm name, he may sue alone as bearer under such blank indorsement.⁵⁰⁸ So, if a note is indorsed to A., B., and C., and A. indorses to B. and C., and they indorse to the plaintiff, it has been held sufficient to sustain an action by him.⁵⁰⁹ If the note is payable to "our, and each of our, order," the indorsee of either payee may bring suit upon it.⁵¹⁰ And, if it is indorsed one-half to A. and one-half to B., they may bring a joint action upon it.⁵¹¹

§ 1636. The payee's individual indorsement is sufficient, although the note is made payable to him as "administrator" ⁵¹² or "guardian," ⁵¹³ or as an agent of the real payee.⁵¹⁴ But an attorney holding a note for the purpose of suit has no power to indorse it, so as to enable his indorsee to bring suit.⁵¹⁵ And, if a note is payable to one as "agent of A.," suit cannot be brought by an assignee under an assignment from A.'s executor.⁵¹⁶

Where a note is made "to any person who shall indorse," it will be sufficient for the plaintiff to aver that it was made to A. and indorsed

⁵⁰⁶ 2 Daniel, Neg. Inst. 220; 2 Pars. Notes & B. 440; *Estabrook v. Smith*, 6 Gray (Mass.) 570; *Miller v. Bledsoe*, 2 Ill. 530. But see, contra, where the payees were not partners, *Regan v. Jones*, 1 Wyo. 210. And see § 663, supra.

⁵⁰⁷ *Cartwright v. Gardner*, 5 Cush. (Mass.) 273.

⁵⁰⁸ *Benj. Chalm. Dig. art. 142*; 2 Daniel, Neg. Inst. 220; *Manegold v. Dulau*, 30 Wis. 541.

⁵⁰⁹ 2 Daniel, Neg. Inst. 220; 2 Pars. Notes & B. 440; *Goddard v. Lyman*, 14 Pick. (Mass.) 208.

⁵¹⁰ *Absolon v. Marks*, 11 Q. B. 19.

⁵¹¹ *Flint v. Flint*, 6 Allen (Mass.) 34. And see § 734, supra.

⁵¹² *Walter v. Kirk*, 14 Ill. 55. *De Cordova v. Atchison*, 13 Tex. 372. And see § 665, supra.

⁵¹³ *Dorr v. Davis*, 76 Me. 301. As to action by an infant payee, see § 278, supra.

⁵¹⁴ Unless denied under oath by the defendant. *Habersham v. Lehman*, 63 Ga. 380; *GEORGIA* (Civ. Code, § 3705). As to transfer by agent, see §§ 664, 968, supra.

⁵¹⁵ *Eggan v. Briggs*, 23 Kan. 710.

⁵¹⁶ *Cocke v. Dickins*, 4 Yerg. (Tenn.) 29.

by him.⁵¹⁷ But, where an indorsement is of no legal validity (e. g. from husband to wife), the indorsee cannot bring suit to recover possession of the note from a subsequent assignee in bankruptcy of the indorser.⁵¹⁸

Action in United States Courts.

§ 1637. Where jurisdiction of the federal courts is invoked on the ground of residence of the parties in different states, the action will not lie, if only one of two joint makers resides in a state different from the plaintiff.⁵¹⁹ And it is provided by statute that an assignee cannot bring suit in the United States courts "to recover the contents of any promissory note or other chose in action, * * * unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."⁵²⁰ And it has been held that an indorsee cannot bring suit against an alien maker in the federal courts, where his indorser, who was also an alien, could not have sued.⁵²¹ And it is provided that the court shall dismiss the suit, where parties are made or joined, "collusively, * * * for the purpose of creating a case cognizable" in the federal courts.⁵²² But the payee may sue the acceptor, although

⁵¹⁷ *United States v. White*, 2 Hill (N. Y.) 59.

⁵¹⁸ *Gay v. Kingsley*, 11 Allen (Mass.) 345. As to indorsement by a married woman, see § 288, *supra*.

⁵¹⁹ *Doremas v. Bennet*, 4 McLean, 224, Fed. Cas. No. 4,001.

⁵²⁰ Rev. St. U. S. § 629. And the indorsee cannot sue, though the indorser was only an accommodation party, and never in possession of the note. *Small v. King*, 5 McLean, 147, Fed. Cas. No. 12,960. It must appear that the indorser could have sued. *Parker v. Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912. The statute applies to a check, *Coffee v. Bank*, 13 How. 183; but not to a bill drawn in one state on another, and indorsed to a citizen of a third state, *Buckner v. Finley*, 2 Pet. 588. And the statute does not apply to the transfer of a note to a bona fide holder for the purpose of having suit brought in the United States court free from defenses, where the indorser could have sued in that court subject to such defenses, *Lanning v. Lockett*, 10 Fed. 451; nor to the foreclosure of a collateral mortgage, *Tredway v. Sanger*, 107 U. S. 323, 2 Sup. Ct. 691.

⁵²¹ *Montalet v. Murray*, 4 Cranch, 46.

⁵²² Acts U. S. 1875, c. 137, § 5; Acts U. S. 1887, c. 373, § 35. And see, as to such collusion, *Hawes v. Oakland*, 104 U. S. 450; *Detroit City v. Dean*, 106 U. S. 537, 1 Sup. Ct. 560; *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. 807. The transfer, to be collusive, must be shown to have been for the purpose (2334)

his drawer could not.⁵²³ And an indorsee who is the original taker from an accommodated payee, may sue the accommodation maker.⁵²⁴

An indorsee may sue his indorser in the federal courts, although neither he nor his indorser could have sued the maker there.⁵²⁵ Under the statute, the holder of a note payable to "A. or bearer" might formerly bring suit in the federal courts against the maker (a citizen of another state) as bearer, although really holding as purchaser from A., who could not have brought the suit.⁵²⁶ This is now expressly forbidden by statute, and the holder of such note is put on the same footing as an indorsee.⁵²⁷

pose of giving jurisdiction. *Lanier v. Nash*, 121 U. S. 404, 7 Sup. Ct. 919; and a transfer for value to a bona fide holder is not collusive, *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. 67; although as collateral for a smaller debt, *Lipsmeier v. Vehslage*, 29 Fed. 175. This statute has been applied to municipal bonds. *New Providence Tp. v. Halsey*, 117 U. S. 336, 6 Sup. Ct. 764.

⁵²³ *Superior City v. Ripley*, 138 U. S. 93, 11 Sup. Ct. 288.

⁵²⁴ *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288; *Id.*, 36 Fed. 484.

⁵²⁵ *Young v. Bryan*, 6 Wheat. 146; *Mullen v. Torrance*, 9 Wheat. 537; *Evans v. Gee*, 11 Pet. 80; *Gaylord v. Johnson*, 5 McLean, 448, Fed. Cas. No. 5,285; *Dennison v. Larned*, 6 McLean, 496, Fed. Cas. No. 3,798; *Campbell v. Jordan*, Hemp. 534, Fed. Cas. No. 2,362.

⁵²⁶ *Halsted v. Lyon*, 2 McLean, 226, Fed. Cas. No. 5,968; *Bank of Kentucky v. Wister*, 2 Pet. 318; *Bank of British North America v. Barling*, 46 Fed. 357; *Jones v. Shapera*, 6 C. C. A. 423, 57 Fed. 457; *Thompson v. Perrine*, 106 U. S. 589, 1 Sup. Ct. 504, 508. So, on a county warrant to bearer, *Adams v. Commissioners*, 23 Fed. 211; or on a municipal bond to bearer, *Ackley School v. Hall*, 113 U. S. 135, 5 Sup. Ct. 371; *Newgass v. City of New Orleans*, 33 Fed. 196; without averment that the nominal payee could have sued, *Varner v. Vest*, 1 Woods. 493, Fed. Cas. No. 16,885. So, the bearer of a note payable to the "order of ——" *Steel v. Rathbun*, 42 Fed. 390. But a holder who is a mere agent, and has possession only for the purpose of such suit, cannot sue in the United States courts. *Welles v. Newberry*, 4 McLean, 226, Fed. Cas. No. 17,378.

⁵²⁷ "Nor shall any circuit or district court have jurisdiction of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." Act U. S. 1887, c. 373, § 1. And this act has been applied to the assignment of a county warrant which was payable to order, *Rollins v. Chaffee Co.*, 34 Fed. 911; or nonnegotiable, *Wilson v. Knox Co.*, 43 Fed. 481; or of a county bond, *McLean v. Valley Co.*, 74 Fed. 380. And see *Skinner v. Barr*, 77 Fed. 816.

If a note is nonnegotiable by statute, it is not within the provision of the act of congress as to "notes negotiable by the law merchant," the statute of the state where the note was made being part of the contract.⁵²⁸ And the purchaser of bank notes may bring a replevin suit for them in the federal court, although his assignor could not bring such suit,⁵²⁹ such suit not being brought to recover the contents of a note, and therefore not being within the provisions of the statute. So, the assignee of a bankrupt holder may bring suit against a collecting agent for negligence.⁵³⁰

Action by Pledgee.

§ 1638. The indorsee of a bill or note may bring an action upon it, although he holds it as collateral only, provided that the legal title is in him.⁵³¹ And he may sue in New York as the trustee of an express trust under the statute,⁵³² even without an indorsement made to him.⁵³³ So, while the debt secured remains unpaid, action may be brought by one who holds under a special indorsement from the pledgee,⁵³⁴ or even, without the pledgee's indorsement, under a prior blank indorsement.⁵³⁵ And, where a note secured by mortgage is assigned as collateral, the entire legal estate in the mortgage is in the pledgee, although it exceeds in amount the debt secured, and the mortgage may be foreclosed by the pledgee as the legal holder.⁵³⁶

In an action brought by the pledgee in possession of a note by indorsement, the maker cannot set up the defense that the pledgor has tendered payment of the debt secured, and brought an action of trover

⁵²⁸ *Gregg v. Weston*, 7 Biss. 360, Fed. Cas. No. 5,800; *Windsor Sav. Bank v. McMahon*, 38 Fed. 283. But see, contra, where the note was not in terms negotiable. *Shuford v. Cain*, 1 Abb. U. S. 302, Fed. Cas. No. 12,823.

⁵²⁹ *Deshler v. Dodge*, 16 How. 622.

⁵³⁰ *Barney v. Globe Bank*, 5 Blatchf. 107, Fed. Cas. No. 1,031.

⁵³¹ *Sheldon v. Middleton*, 10 Iowa, 17; *Mechanics' & Traders' Ins. Co. v. Lozano (La.)* 1 South. 608; *White v. Phelps*, 14 Minn. 27 (Gil. 21). As to actions by a pledgee, see § 796 et seq., supra.

⁵³² *Clark v. Titcomb*, 42 Barb. 122.

⁵³³ *Van Riper v. Baldwin*, 19 Hun, 344.

⁵³⁴ *Marine Bank of New York City v. Vall*, 6 Bosw. (N. Y.) 421.

⁵³⁵ *Lindsay v. Chase*, 104 Mass. 253.

⁵³⁶ *Dundas v. Bowler*, 3 McLean, 397, Fed. Cas. No. 4,141.

against the pledgee for the note.⁵³⁷ And, even where the debt secured by the pledge of a note has been subsequently discharged, the pledgee may still sue as trustee for the pledgor, and may recover as such, provided that no equitable defense available against the pledgor is prejudiced by the suit.⁵³⁸ But if a negotiable bond is deposited with a bank for the benefit of a pledgee, and he takes a certificate to that effect from the bank, the bank will be estopped by its certificate from afterwards setting up ownership in another prior pledgee.⁵³⁹

Action by Assignee.

§ 1639. At common law the assignee of a bill or note without due indorsement must bring suit upon it in the name of his assignor.⁵⁴⁰ But, if the note has been paid to and surrendered by the payee without indorsement, his name cannot afterwards be used in an action brought for the use of the party paying, notwithstanding the payee's subsequent consent to the suit.⁵⁴¹ Where a note is in the hands of a depositary, however, who refuses to surrender it, suit may be brought by the assignor in trover by consent of the assignee.⁵⁴² But without a formal assignment the purchaser of a bill will only acquire an equitable interest in collateral securing it, and cannot bring suit for its conversion in his own name.⁵⁴³

In many of the states, however, an assignee may bring suit, by force of the statute, in his own name.⁵⁴⁴ So, although the assignment was made upon a separate paper, and the note assigned was at

⁵³⁷ *Tarbell v. Sturtevant*, 26 Vt. 513.

⁵³⁸ *Logan v. Cassell*, 88 Pa. St. 288. But see, contra, *New England Trust Co. v. New York Belting & Packing Co.*, 166 Mass. 42, 43 N. E. 928.

⁵³⁹ *Gibson v. Lenhart*, 111 Pa. St. 624, 5 Atl. 52.

⁵⁴⁰ See § 791, supra. So, a note cannot be taken up at maturity by the indorser, and so assigned afterwards that the assignee can sue in his own name. *Swann v. Scholfield*, 2 Cranch, C. C. 140, Fed. Cas. No. 13,676

⁵⁴¹ *Merrimack Bank v. Parker*, 7 Pick. (Mass.) 88.

⁵⁴² *Day v. Whitney*, 1 Pick. (Mass.) 503.

⁵⁴³ *Batchelder v. Jenness*, 59 Vt. 104, 7 Atl. 279.

⁵⁴⁴ See § 1631, supra. So, *Callahan v. Crow*, 91 Hun, 346, 36 N. Y. Supp. 225. But even under the Code in NORTH CAROLINA an assignee cannot sue in his own name, if the assignment is without consideration, and for the benefit of the assignor (or in effect a power to collect). *Abrams v. Cureton*, 74 N. C. 523.

the time in the hands of an unlawful holder.⁵⁴⁵ And the assignee of a bank may bring suit in equity, without the aid of the statute, under the general assignment to him, upon notes held by the bank, and indorsed by it in blank.⁵⁴⁶ The assignee of a note payable to bearer cannot bring suit against a maker, who has been discharged in bankruptcy, on a new promise made by the bankrupt to the plaintiff's assignor.⁵⁴⁷ But, if a bill is taken up by an accommodation acceptor, his assignee may bring suit against the drawer in his own name on an express promise of payment made to him.⁵⁴⁸ And the assignee of an insolvent payee may reassign the note to the payee, and bring suit upon it for his use.⁵⁴⁹ And even where the payee assigns a note in fraud of creditors, and indorses on the note the amount alleged to be due to his assignee, the latter may recover against the maker in his own name, and hold the balance as trustee for the payee.⁵⁵⁰ On the other hand, where two notes are assigned to different parties, their interest is separate, and they cannot sue jointly upon the notes, although secured by one mortgage.⁵⁵¹

§ 1640. — Where a note is not transferable, as in the case of a note made to a public officer for public dues or fines, an assignment confers no right of action upon the assignee.⁵⁵² But making a note payable to A., guardian of B.," for an individual debt due to A., will not prevent its subsequently passing to A.'s assignee in bankruptcy.⁵⁵³

⁵⁴⁵ *Morris v. Pollon*, 50 Ala. 403.

⁵⁴⁶ *Lenox v. Roberts*, 2 Wheat. 373. And the maker cannot question the validity of the assignment by the bank. *Shryock v. Basehore*, 82 Pa. St. 159. And it is sufficient if such assignment is valid by the *lex loci contractus*, though invalid by the *lex fori*. *Freeman's Bank v. Ruckman*, 16 Grat. (Va.) 126. So, a bank receiver may sue, and the irregularity of his appointment is no defense. *Case v. Marchand*, 23 La. Ann. 60. And the assignee of a corporation may sue under an assignment by its agent without seal, and, if the assignment is not impeached, he need not prove the authority of the agent. *Garrison v. Combs*, 7 J. J. Marsh. (Ky.) 84.

⁵⁴⁷ *Moore v. Viele*, 4 Wend. (N. Y.) 420.

⁵⁴⁸ *De Barry v. Withers*, 44 Pa. St. 353.

⁵⁴⁹ *Pitts v. Holmes*, 10 Cush. (Mass.) 92.

⁵⁵⁰ *Eason v. Locherer*, 42 Tex. 173.

⁵⁵¹ *Swenson v. Plow Co.*, 14 Kan. 387.

⁵⁵² *Bates v. Butler*, 46 Me. 387. So, a note taken to a sheriff by order of the court, and ordered to be paid to his successor. *Ranney v. Brooks*, 20 Mo. 105.

⁵⁵³ A subsequent transfer to his bondsmen or his ward will not enable them
(2338)

So, a note may be transferred by a foreign executor, and his assignee may sue.⁵⁵⁴ But a foreign assignee in insolvency has no power, in general, to bring suit in his own name.⁵⁵⁵ In North Carolina an assignee could not formerly bring suit in his own name.⁵⁵⁶ So, action must be in the payee's name on a nonnegotiable order for goods,⁵⁵⁷ or on a note under seal.⁵⁵⁸ And, after judgment has been rendered upon a note against the principal, it is no longer negotiable, and the assignee cannot bring suit upon it in his own name against a surety.⁵⁵⁹ But in Massachusetts suit may be brought by an indorsee on a judgment by confession rendered in his favor in another state on a note made there, and containing a warrant to confess judgment, although such a note is nonnegotiable in Massachusetts.⁵⁶⁰

Action by Drawer.

§ 1641. The drawer of a bill may take it up and bring suit against the acceptor.⁵⁶¹ And he may sue in an action of debt.⁵⁶² So, he may transfer it by indorsement, and his indorsee may sue in his own name.⁵⁶³ Or the drawer may bring suit, or have suit brought for his

to bring suit. *Beeson v. Shively*, 28 Kan. 574. And see §§ 724, 1009, *supra*, as to restrictive indorsements.

⁵⁵⁴ *Campbell v. Brown*, 64 Iowa, 425, 20 N. W. 745.

⁵⁵⁵ *Brush v. Curtis*, 4 Conn. 312.

⁵⁵⁶ *Sutton v. Owen*, 65 N. C. 123. And see § 791, *supra*. Although now an assignee or an owner may sue without written assignment. *Wilcoxon v. Logan*, 91 N. C. 449.

⁵⁵⁷ *Fahnestock v. Schoyer*, 9 Watts (Pa.) 102. But the acceptance of a nonnegotiable draft implies a promise to pay the assignee, and he may sue the acceptor for money had and received. *Weston v. Penniman*, 1 Mason, 306, Fed. Cas. No. 17,455.

⁵⁵⁸ *Thompson v. Malone*, 13 Rich. Law (S. C.) 252. Or in Delaware, unless he takes an assignment under seal in the presence of two witnesses. *Kinniken v. Dulaney*, 5 Har. (Del.) 384.

⁵⁵⁹ *Sawyer v. Bradford*, 6 Ala. 572.

⁵⁶⁰ *Richards v. Barlow*, 140 Mass. 218.

⁵⁶¹ *Chit. Bills*, 609; 2 *Daniel*, Neg. Inst. 238; 2 *Pars. Notes & B.* 453; *Simmonds v. Parminter*, 1 Wils. 185, 2 *Brown*, Parl. Cas. 43; *Louviere v. Laubray*, 10 *Mod.* 36; *Zebley v. Voisin*, 7 *Pa. St.* 527; *Rice v. Hogan*, 8 *Dana* (Ky.) 134.

⁵⁶² *Regnault v. Hunter*, 4 *W. Va.* 257.

⁵⁶³ *Chit. Bills*, 608; *Callow v. Lawrence*, 3 *Maule & S.* 97; *Bacon v. Searles*, 1 *H. Bl.* 88; or in the drawer's name, *Tiltcomb v. Thomas*, 5 *Me.* 282.

use, in the name of the party holding the bill at maturity.⁵⁶⁴ So, the drawer may purchase a bill before maturity, and sue as indorsee.⁵⁶⁵ And he may, even as drawer, sue the acceptor on the admission of funds implied by acceptance, without any indorsement from the payee,⁵⁶⁶ or after striking out the payee's indorsement,⁵⁶⁷ or even subsequent indorsements.⁵⁶⁸

But, to support a recovery against the acceptor, the drawer must prove the acceptor's default, and payment of the bill by himself.⁵⁶⁹ And where the drawer takes up a bill by voluntary payment to one who has paid it *supra* protest, after the drawer's discharge for want of notice, he cannot sue the payee on his indorsement.⁵⁷⁰ And he cannot sue the payee as indorser without rebutting the presumption of his own prior liability arising from their relative position on the paper.⁵⁷¹

Action by Executor—Heir.

§ 1642. Where the payee is named expressly as "administrator of A.," he may bring an action in his individual name, treating the additional words as mere description,⁵⁷² or he may bring suit in his

⁵⁶⁴ *Davis v. McConnell*, 3 McLean, 391, Fed. Cas. No. 3,640. And such payment by the drawer will be no defense for the acceptor. *Williams v. James*, 15 Q. B. 498.

⁵⁶⁵ *Louviere v. Laubray*, 10 Mod. 36.

⁵⁶⁶ *Coursin v. Ledlie's Adm'rs*, 31 Pa. St. 506; *Kingman v. Hotaling*, 25 Wend. (N. Y.) 423.

⁵⁶⁷ *Thompson v. Flower*, 1 Mart. N. S. (La.) 301.

⁵⁶⁸ *Pilkington v. Woods*, 10 Ind. 432.

⁵⁶⁹ 2 *Daniel*, Neg. Inst. 238; 2 *Pars. Notes & B.* 453; *Quinn v. Hanley*, 5 Ill. App. 51.

⁵⁷⁰ *Grosvenor v. Stone*, 8 Pick. (Mass.) 79.

⁵⁷¹ *Thoms v. Greene*, 6 Mo. 482.

⁵⁷² *Gilman v. Horseley*, 5 Mart. N. S. (La.) 661; *Barnes v. Modisett*, 3 Blackf. (Ind.) 253; *Ratcliff v. Everman*, 87 Ind. 446; *Moss v. Witcher*, 35 Tex. 388. So, A. may sue on a note to "A., executor of B." *Evans v. Gordon*, 8 Port. (Ala.) 142; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58. And see § 440, *supra*. And suit will survive, either to his personal representatives or to the administrator de bonis non of the original estate. *Wood v. Tomlin*, 92 Tenn. 514, 22 S. W. 206. So, if a note is payable to "A. B., guardian," his administrator may sue, and the equitable interest of the ward cannot be set up in defense. *Eckford v. Hogan*, 44 Miss. 398.

representative capacity.⁵⁷³ And if a bill is indorsed to A., as administrator of B., for a debt to B., an action may be brought upon it by an administrator of B. afterwards appointed *de bonis non*.⁵⁷⁴ Where one of two executors gives his note or bond to the other as "executor," and expressly for money borrowed from the estate of their testator, the executor of the payee so named may bring suit against the maker, even before settlement made by him with the original testator's estate.⁵⁷⁵ An executor, however, can only sue as such on a note payable to the order of his testator, and not indorsed by him.⁵⁷⁶ But if the note has been indorsed in blank by the testator, and put into a bank for collection, and comes after his death into the hands of the executor, he may bring suit upon it in his own name, under the blank indorsement, as bearer.⁵⁷⁷ And he may sue in his own name under a blank indorsement to his testator.⁵⁷⁸

A foreign executor may bring suit upon a note payable to bearer in his own name as bearer.⁵⁷⁹ And it seems that in Virginia an executor appointed in another state, where the payee resided at his death, may sue upon a note payable to his testator, by virtue of the foreign letters.⁵⁸⁰ It has been held, however, that, even where letters were taken out in the state of Maryland before the separation of the District of Columbia, the administrator's indorsee could not sue in the District of Columbia without taking out fresh letters there.⁵⁸¹ Where a note is indorsed to one who is dead at the time, but not known to be so, suit may be brought on it by his administrator.⁵⁸²

⁵⁷³ *Sasscer v. Walker's Ex'rs*, 5 Gill & J. (Md.) 102.

⁵⁷⁴ *Catherwood v. Chabaud*, 1 Barn. & C. 150. So, where the original executor was a surety on the note, and could not have brought suit against himself. *Moore v. Randolph's Adm'r*, 70 Ala. 575.

⁵⁷⁵ *Alston v. Jackson*, 26 N. C. 49.

⁵⁷⁶ *Woodbury v. Woodbury*, 47 N. H. 11. And a collateral mortgage can only be foreclosed by him. *Morse v. Clayton*, 13 Smedes & M. (Miss.) 373. Such a note is no ground for equity jurisdiction. *Nash v. Hogan*, 45 N. J. Eq. 108, 16 Atl. 433.

⁵⁷⁷ *Barlow v. Myers*, 24 Hun (N. Y.) 286.

⁵⁷⁸ 2 Pars. Notes & B. 446.

⁵⁷⁹ *Knapp v. Lee*, 42 Mich. 41, 3 N. W. 244.

⁵⁸⁰ *Giddings v. Green*, 4 Hughes, 446, 48 Fed. 480.

⁵⁸¹ *Fenwick v. Sears' Adm'rs*, 1 Cranch, 259.

⁵⁸² *Murray v. East India Co.*, 5 Barn. & Ald. 204.

And this is provided expressly by statute in Virginia.⁵⁸³ And in some states the widow of a deceased holder is allowed to bring suit on a note payable to him without administration, where she is his only heir at law.⁵⁸⁴ But in such case the complainant must aver all necessary facts to show her right to recover.⁵⁸⁵ Where one is entitled to a note by a *donatio causa mortis* from the payee, he may bring an action against the maker in the name of the payee's personal representative,⁵⁸⁶ even without the indorsement of the payee, and without the consent of the administrator.⁵⁸⁷

Action by Indorser.

§ 1643. When a bill or note is taken up at maturity by an indorser, he may at once bring suit against prior parties, but he can only do so upon payment made by him.⁵⁸⁸ And he need not prove notice of dishonor sent to himself, provided such notice has been duly received by the party sued.⁵⁸⁹ If he takes up the paper by another note, it will be sufficient payment to support his action.⁵⁹⁰ And, if an accommodation indorser pays the note, he may recover against the maker, either as purchaser of the note, or in an action for money paid.⁵⁹¹ An indorser, upon paying a bill or note, may enforce a col-

⁵⁸³ VIRGINIA (Code, § 2854).

⁵⁸⁴ *Beglen v. Freeman*, 75 Ind. 398; or his mother, *Spencer v. Millican*, 31 Tex. 65. So, the heirs may sue in Iowa if there is no admission for five years. *Phinny v. Warren*, 52 Iowa, 332, 1 N. W. 522, and 3 N. W. 157.

⁵⁸⁵ E. g. relinquishment by the widow of her statutory \$500. *Williams v. Riley*, 88 Ind. 290.

⁵⁸⁶ *Grover v. Grover*, 24 Pick. (Mass.) 261; *Sessions v. Moseley*, 4 Cush. (Mass.) 87. And see § 807, *supra*.

⁵⁸⁷ *Bates v. Kempton*, 7 Gray (Mass.) 382.

⁵⁸⁸ 2 Daniel, Neg. Inst. 238; 2 Pars. Notes & B. 453; *Bradford v. Bucknam*, 12 Me. 15; *Small v. Jones*, 8 Watts (Pa.) 265. And see § 1429 *et seq.*, *supra*. But if the maker of a note gives the indorser a demand note for his indemnity on his agreeing to take up the original note, he may have an attachment against the maker's property on the demand note before the original note matures or is paid by him; but there can be no recovery for more than he pays on the original note, nor until he has paid it. *Little v. Little*, 13 Pick. (Mass.) 426.

⁵⁸⁹ *Ellsworth v. Brewer*, 11 Pick. (Mass.) 316. And see § 1433, *supra*.

⁵⁹⁰ *Bullard v. Wilson*, 5 Mart. N. S. (La.) 196. And see chapter 41, *supra*.

⁵⁹¹ *Barker v. Parker*, 10 Gray (Mass.) 339. But see, to the effect that the (2342)

lateral mortgage.⁵⁵² But his paying a judgment rendered against himself and the maker will not entitle him to proceed summarily, under the statute as to sureties, against a prior indorser.⁵⁵³

An indorser who takes up a bill or note at maturity sues upon it in his own right.⁵⁵⁴ And, if the bill has been transferred in payment of a precedent debt, the holder may bring suit as a bona fide purchaser for the use of the indorser after payment by him.⁵⁵⁵ But an indorser taking up commercial paper cannot sue in the name of a later indorsee without his consent.⁵⁵⁶ If the maker, however, confesses judgment to the indorser, and judgment is rendered at the same time against the maker in favor of the indorsee, the court will protect the indorser by an order giving preference to his execution.⁵⁵⁷

Plaintiff's Indorsement Canceled.

§ 1644. Where there are several indorsers, an action need not be brought in the name of the last holder, but any indorser may sue on striking out the subsequent indorsements.⁵⁵⁸ If an indorser takes up the note after protest, he may strike out his indorsement and

recovery can be on the note only, *Kennedy v. Carpenter*, 2 Whart. (Pa.) 344. He may sue in the name of the payee, *Bank of Spencer v. Simmons*, 43 W. Va. 79, 27 S. E. 290; or by delivery from, and for the use of, his own indorsee, *Berney v. Steiner*, 108 Ala. 111, 19 South. 806.

⁵⁵² *Page v. Green*, 6 Conn. 338.

⁵⁵³ *Devinney v. Lay*, 19 Mo. 646. But, if he pays pending suit against himself and the maker, he may continue the suit as against the maker. *Oneida Co. Bank v. Lewis*, 23 Misc. Rep. 34, 51 N. Y. Supp. 826.

⁵⁵⁴ *Chit. Bills*, 609; 2 *Pars. Notes & B.* 455; *Cowley v. Dunlop*, 7 Term R. 571; *Death v. Serwonters*, *Lutw.* 272; *Bosanquet v. Dudman*, 1 *Starkie*, 2.

⁵⁵⁵ *Poirier v. Morris*, 2 El. & Bl. 89; *Bank of America v. Senior*, 11 R. 1. 376. But not without the indorser's consent. *Workingmen's Building & Loan Ass'n v. Roumfort*, 98 Pa. St. 85.

⁵⁵⁶ *Byles, Bills*, 410. And the objection may be raised by the defendant, as well as by the indorsee. *Coleman v. Biedman*, 7 C. B. 871.

⁵⁵⁷ *Bank of Auburn v. Throop*, 18 Johns. (N. Y.) 505.

⁵⁵⁸ *Chit. Bills*, 605; 2 *Daniel, Neg. Inst.* 238; *Stones v. Butt*, 2 *Crompt. & M.* 416, 2 *Dowl.* 335; *Bond v. Storrs*, 13 Conn. 412, including his own indorsement; and whether that was for value or for collection only. *Warren v. Gilman*, 15 Me. 70. And if it has been indorsed by him and reissued several times, he may strike them all out. *Reading v. Beardsley*, 41 Mich. 123, 1 N. W. 965. As to the power to strike out indorsements, see § 716 et seq., *supra*.

bring suit in his own name.⁵⁹⁹ And he may strike out a blank indorsement by himself at the time of trial.⁶⁰⁰ And indorsees may sue in the name of the payee, striking out a special indorsement to themselves, even at the time of trial.⁶⁰¹ So, after a special indorsement to A., and an indorsement in blank by him, the payee, on recovering possession of the bill, may sue the acceptor as payee, disregarding or striking out the indorsements.⁶⁰² So, after filling a blank indorsement specially to a collecting agent, but not expressly for collection, the indorser may strike out his special indorsement, and bring suit in his own name under the original blank indorsement.⁶⁰³ And if the payee sues upon a note, with special indorsements apparently erased by a line drawn through them rendering them almost illegible, he need not show that he is the owner, or that the indorsements were for collection only.⁶⁰⁴ If, on the trial, several blank indorsements, including that of the plaintiff, appear on the note, the plaintiff may strike out his own, and fill up the others to correspond with the allegations in his declaration.⁶⁰⁵ And where his indorsement is erased it will be presumed that he is the owner, and that the indorsement was erased by proper authority.⁶⁰⁶ And if he has lost the note after indorsing it, and is therefore unable to strike out the indorsement, he may bring suit, as the real party in interest, in the indorsee's name.⁶⁰⁷

Plaintiff's Indorsement Uncanceled.

§ 1645. The holder's own indorsement left uncanceled on the note will not, in general, prevent his recovery; but from his possession it will be presumed that the paper was not delivered under the indorse-

⁵⁹⁹ *Witherell v. Ela*, 42 N. H. 295; *Caldwell v. Evans*, 5 Bush (Ky.) 380.

⁶⁰⁰ *Parks v. Brown*, 16 Ill. 454; although the note is negotiated in bank, and therefore equivalent to a foreign bill, *Bell v. Morehead*, 3 A. K. Marsh. (Ky.) 158. So, a blank indorsement for collection may be struck out. *Manhattan Co. v. Reynolds*, 2 Hill (N. Y.) 140.

⁶⁰¹ *Kyle v. Thompson*, 3 Ill. 432.

⁶⁰² *Green v. Jackson*, 15 Me. 136.

⁶⁰³ *Bank of Utica v. Smith*, 18 Johns. (N. Y.) 230.

⁶⁰⁴ *Dollfus v. Frosch*, 1 Denio (N. Y.) 367.

⁶⁰⁵ *Pickett v. Stewart*, 12 Ala. 202.

⁶⁰⁶ *Goddard v. Cunningham*, 6 Iowa, 400.

⁶⁰⁷ *Leavitt v. Cowles*, 2 McLean, 491, Fed. Cas. No. 8,171.

ment, or was afterwards taken up by him.⁶⁰⁸ And he may recover, notwithstanding an indorsement made by him for collection,⁶⁰⁹ although such indorsement is a special one.⁶¹⁰ And the defendant, after once admitting the plaintiff's title in his pleadings, cannot call it in question by reason of his indorsement to a collecting agent.⁶¹¹

An indorser may even bring suit without actual possession, if the indorsee holds the bill merely as his agent or trustee, and for the purpose of collection.⁶¹² But an indorser cannot sue where the title to the bill, as well as the possession, is in another.⁶¹³ So, where the drawer of a bill has agreed to pay a certain sum per month on it to the payee, the agreement is incidental to the bill itself, and cannot be enforced by the payee after transfer of the bill.⁶¹⁴

§ 1646. — Where the indorsement by the plaintiff was for collection only, reindorsement to him is, in general, unnecessary.⁶¹⁵ And

⁶⁰⁸ *Picquet v. Curtis*, 1 Sumn. 478, Fed. Cas. No. 11,131; *Mottram v. Mills*, 1 Sandf. (N. Y.) 37; *Page v. Lathrop*, 20 Mo. 589; *Kerrick v. Stevens*, 58 Mich. 297, 25 N. W. 199; *Stephens v. McNeill*, 26 Barb. (N. Y.) 651; *Merz v. Kaiser*, 20 La. Ann. 377; *Leltner v. Miller*, 49 Ga. 486; *Brady v. White*, 4 Raxt. (Tenn.) 382; *Beeson v. Lippman*, 52 Ala. 276; *Anniston Pipe Works v. Mary Pratt Furnace Co.*, 94 Ala. 606, 10 South. 259; *Daniel v. Royce*, 96 Ga. 546, 23 S. E. 493; *Kerrick v. Stevens*, 58 Mich. 297, 25 N. W. 199. So, after an assignment and redelivery. *Haug v. Riley* (Ga.) 29 S. E. 44.

⁶⁰⁹ 2 *Daniel*, Neg. Inst. 234; 2 *Pars. Notes & B.* 441; *Best v. Bank*, 76 Ill. 608; *Dickinson v. Burr*, 15 Ark. 372; *Habersham v. Lehman*, 63 Ga. 380; *Dann v. Norris*, 24 Conn. 333; *Locke v. Silk Co.*, 37 Mich. 479.

⁶¹⁰ *Chantauqua Co. Bank v. Davis*, 21 Wend. (N. Y.) 584. And that it was for such purpose may be shown by parol evidence. *Wright v. Boyd*, 3 Barb. (N. Y.) 523.

⁶¹¹ *Sawyer v. Macaulay*, 18 S. C. 543.

⁶¹² *Byles*, Bills, 410; *Chitt. Bills*, 606; *Stones v. Butt*, 2 *Crompt. & M.* 416, 2 *Dowl.* 335; *Dabbs v. Humphries*, 10 *Bing.* 446, 1 *Scott*, 325, and 4 *Moore & S.* 285; *Ancona v. Marks*, 7 *Hurl. & N.* 686; *National Sav. Bank Ass'n v. Tranah*, L. R. 2 *C. P.* 556.

⁶¹³ *Campbell v. Humphries*, 3 *Ill.* 478; *Gullfont v. Parish of Ascension*, 28 *La. Ann.* 413; *Johnson v. English*, 1 *Stew. (Ala.)* 169; *Hunt v. Stewart*, 7 *Ala.* 525. At least not without direction or consent of the owner. *Bragg v. Greenleaf*, 14 *Me.* 395. But see *Gray v. Wood*, 2 *Har. & J. (Md.)* 328.

⁶¹⁴ *Florence v. Drayson*, 1 *C. B. (N. S.)* 584.

⁶¹⁵ *Dugan v. U. S.*, 3 *Wheat.* 172; *Picquet v. Curtis*, 1 Sumn. 478, Fed. Cas. No. 11,131; *Norris v. Badger*, 6 *Cow. (N. Y.)* 440; *Barbarin v. Daniels*, 7 *La.* 479.

he may sue without alleging or proving any retransfer,⁶¹⁶ although the indorsement by him is a special one,⁶¹⁷ and followed by other special indorsements.⁶¹⁸ So, if he has indorsed the note in blank, and it is retransferred to him by delivery, he may bring suit upon his possession without filling the indorsement to himself.⁶¹⁹

On the other hand, a reindorsement is necessary in some states to enable a plaintiff to recover on a note indorsed by himself,⁶²⁰ especially where he has indorsed the note specially to another.⁶²¹ And in such case he cannot bring suit against his immediate indorser, after suit has been brought by his indorsee against the maker, and judgment rendered in such suit in the maker's favor on proof of payment already made by him to the payee.⁶²²

Action by Surety—Joint Debtor.

§ 1647. Where a bill is taken up by a surety or guarantor or by an accommodation party, or is paid supra protest, it is not extinguished, and the party paying it may sue prior parties.⁶²³ So, if one joint maker pays a note, he may sue his co-makers for contribution;⁶²⁴ or

⁶¹⁶ *Brinkley v. Going*, 1 Ill. 366.

⁶¹⁷ *Rider v. Taintor*, 4 Allen (Mass.) 356; *Wickersham v. Jarvis*, 2 Mo. App. 279; *Pitts v. Keyser*, 1 Stew. (Ala.) 154.

⁶¹⁸ *Cox v. Shims*, 1 Cranch, C. C. 238, Fed. Cas. No. 3,306; *Glasgow v. Switzer*, 12 Mo. 395.

⁶¹⁹ *Sprigg v. Cuny's Helrs*, 7 Mart. N. S. (La.) 253.

⁶²⁰ *Hart v. Windle*, 15 La. 265; unless the indorsement appears to be for collection, *Dicks v. Cash*, 6 Mart. N. S. (La.) 45.

⁶²¹ *Bright v. Hand*, 16 N. J. Law, 273; *Lawrance v. Fussell*, 77 Pa. St. 460; *Southern Bank v. Mechanics' Sav. Bank*, 27 Ga. 252; *Robson v. Earley*, 1 Mart. N. S. (La.) 373.

⁶²² *Welch v. Lindo*, 7 Cranch, 159.

⁶²³ For actions by surety, see chapter 29; also, §§ 1435, 1436, supra. So, by guarantor, § 862; and by payor supra protest, § 1437. But a bank paying a customer's acceptance, which is made payable at his banking house, must sue the acceptor for the consideration, and not as a payor for honor. *Holroyd v. Whitehead*, 5 Taunt. 444, 3 Camp. 530. And if the maker's bill pays the note he is like a payor supra protest, and cannot sue the indorsees. *Hull v. Pittfield*, 1 Wils. 46; *Chit. Bills*, 609.

⁶²⁴ *Hoyt v. Lock*, 41 Ill. 119; *Judd v. Small*, 107 Ind. 398, 8 N. E. 284. But the suit for contribution cannot be brought or continued in the payee's name after payment in full by one joint maker. *Hendrickson v. Hutchinson*,

for exoneration, if he signed it for the accommodation of his co-maker.⁶²⁵ So, if one of two joint accommodation indorsers pays a note after it has matured and been taken up by a guarantor, he may still have his action for contribution against his co-indorser.⁶²⁶

In general, the acceptor of a bill is the party primarily liable. But, if an accommodation acceptor pays the bill, he has his action against the drawer, whom he accommodated, although such action is not on the bill itself.⁶²⁷

Action by Bearer.

§ 1648. Possession of a bill or note carries with it presumption of title in the holder,⁶²⁸ whether it is payable on its face to the bearer,⁶²⁹ or is so payable in effect by reason of a blank indorsement by the payee or a subsequent indorsee holding the legal title.⁶³⁰ And the presump-

29 N. J. Law, 180. And see § 1426, *supra*. And the action must be for money paid, and not on the note. *Miller v. Zeigler*, 3 Utah, 17, 5 Pac. 518.

⁶²⁵ *Wheeler v. Young*, 143 Mass. 143, 9 N. E. 531. And see § 1426, *supra*. And such suretyship may be averred in Indiana without setting out a copy of the note. *Porter v. Waltz*, 108 Ind. 40, 18 N. E. 705.

⁶²⁶ *Steckel v. Steckel*, 28 Pa. St. 233.

⁶²⁷ *Chit. Bills*, 609; 2 Daniel, *Neg. Inst.* 219; 1 Edw. *Bills & N.* § 522; 2 *Par. Notes & B.* 460; *Young v. Hockley*, 3 Wils. 346; *De Barry v. Withers*, 44 Pa. St. 356. But the bill may be set out in the declaration as an inducement. *Griffin v. Lawton*, 54 Ga. 104. And his possession of the bill is presumptive evidence of his right to sue. *Hunter v. Kibbe*, 5 McLean, 279, Fed. Cas. No. 6,907. But see 2 Daniel, *Neg. Inst.* 239; *Jewell v. Parr*, 13 C. B. 909. And the acceptor's assignee may sue in his own name upon an express promise made to him. *De Barry v. Withers*, *supra*.

⁶²⁸ *King v. Gottschalk*, 21 Iowa, 512; *Morss v. Gleason*, 2 Hun (N. Y.) 31; *Long v. Crawford*, 18 Md. 220; *Sawyer v. Moran*, 3 Tenn. Ch. 35; *Cheney v. Stone*, 29 Fed. 885.

⁶²⁹ *James v. Chalmers*, 6 N. Y. 209; *Rider v. Duval*, 28 Tex. 622. So, a check, *McLean v. Banking Co.*, 9 App. Cas. 95; *Townsend v. Billinge*, 1 Hilt. (N. Y.) 353; or coupon, *Philadelphia & R. R. Co. v. Smith*, 105 Pa. St. 195.

⁶³⁰ *Dean v. Hewitt*, 5 Wend. (N. Y.) 257; *Porter v. Gunnison*, 2 Grant. Cas. (Pa.) 297; *Little v. O'Brien*, 9 Mass. 423; *Way v. Richardson*, 3 Gray (Mass.) 412; *Bedell v. Carll*, 33 N. Y. 581; *Lohman v. Bank*, 87 Ill. 616; *Whitten v. Hayden*, 9 Allen (Mass.) 408; *Griffon v. Jacobs*, 2 La. 193; *New Orleans Canal & Banking Co. v. Bailey*, 18 La. Ann. 676; *Sterling v. Bender*, 7 Ark. 201; *Leitensdorfer v. Webb*, 1 N. M. 34. But a formal objection that the action should have been brought in the bearer's (and not in the payee's) name

tion from possession arises whether the bill is acquired before or after maturity.⁶³¹ But the plaintiff must be in possession before suit brought by him.⁶³² It is not necessary, however, to fill the indorsement specially to the plaintiff.⁶³³

In like manner a note payable to "A. or bearer" is, in effect, payable to bearer, and may be sued upon by any holder in possession,⁶³⁴ although the holder of such a note was formerly required, at common law, to prove his title.⁶³⁵ He may bring suit either in his own name or in that of the nominal payee.⁶³⁶ And even where he holds as trustee for another, and the note has never been delivered to A., he may bring suit for the use of the party beneficially interested.⁶³⁷ So, if he holds as agent of A. for collection, he may bring suit as bearer.⁶³⁸ But, where a note is payable to a designated bank or

cannot be taken at a late day in the suit, when a fresh suit would be barred by the statute of limitations. *Jones v. Martins*, 13 Pa. St. 614.

⁶³¹ *James v. Chalmers*, 6 N. Y. 209; *McCann v. Lewis*, 9 Cal. 246; *Rankin v. Woodworth*, 2 Watts (Pa.) 134; *Pugh v. Grant*, 86 N. C. 39; although this appears on the instrument by the date of a guaranty indorsed after maturity by the payee, *Smith v. Schanck*, 18 Barb. (N. Y.) 344. So, if a nonnegotiable note is indorsed in blank after maturity, the indorsee may sue the indorser in his own name. *Leidy v. Tammany*, 9 Watts (Pa.) 353.

⁶³² *Emmett v. Tottenham*, 8 Exch. 884; *Hovey v. Sebring*, 24 Mich. 232.

⁶³³ *Palmer v. Bank*, 78 Ill. 380; *Owen v. Arrington*, 17 Ark. 530; although the holder is merely a collecting agent, *Lafin v. Sherman*, 28 Ill. 391. And he may fill up the blank indorsement with his own name, *Orr v. Lacy*, 4 McLean, 243, Fed. Cas. No. 10,589, or with the name of any other person, *Agee v. Medlock*, 25 Ala. 281. And see § 708 et seq. supra. But if he indorses it to a bank for collection, and it is returned with the indorsement uncanceled, he cannot sue in the name of the bank. *Watson v. Bank*, 4 Metc. (Mass.) 343.

⁶³⁴ See §§ 159, 654, 698, supra.

⁶³⁵ *Hinton's Case*, 2 Show. 235.

⁶³⁶ *Ware v. Key*, 2 McCord (S. C.) 373. And any subsequent holder may sue in his own name upon a guaranty indorsed to "A. or bearer." *Ketchell v. Burns*, 24 Wend. (N. Y.) 456.

⁶³⁷ *Boardman v. Roger*, 17 Vt. 589. But in case of a nonnegotiable note to "A. or bearer," parol evidence is inadmissible to show an agreement on delivery to B., that he might sue as bearer. *Whitwell v. Winslow*, 134 Mass. 343. But the equitable owner may sue on such a note, *Cobb v. Bryant*, 86 Ala. 316, 5 South. 586; although he could not if it was negotiable, ALABAMA (Code, § 1761).

⁶³⁸ *Brigham v. Gurney*, 1 Mich. 349.

bearer, the receiver of the bank holding under a judicial appointment cannot sue as bearer, but must bring suit in the capacity in which he holds the note.⁶³⁹ On the other hand, if the note is payable to a fictitious payee, the holder cannot bring suit upon it as bearer against a party having no notice of the fictitious character of the payee.⁶⁴⁰ But any holder may sue as bearer of a note made payable "to order" without designating any payee.⁶⁴¹

Action by Owner.

§ 1649. The title and possession should unite in the party who brings suit; the title being in some cases presumed from the fact of possession, as we have seen. The action should be by the party who is entitled to receive the contents of the bill.⁶⁴² But the defendant cannot question the plaintiff's title, except on the ground of bad faith in the plaintiff, or prejudice to the defendant's rights.⁶⁴³ Thus, where suit is brought on a note by a national bank as purchaser, the defendant cannot question its title on the ground of a want of cor-

⁶³⁹ *Bradford v. Jenks*, 2 McLean, 130, Fed. Cas. No. 1,769.

⁶⁴⁰ See § 164, *supra*. So, by statute in NEW YORK. *Maniort v. Roberts*, 4 E. D. Smith, 83. And there is no use of feigning to hold by indorsement from such fictitious payee. *Foster v. Shattuck*, 2 N. H. 446.

⁶⁴¹ *Davega v. Moore*, 3 McCord (S. C.) 482.

⁶⁴² *Byles, Bills*, 410; 2 Daniel, Neg. Inst. 235; 2 Pars. Notes & B. 436; *Emmett v. Tottenham*, 8 Exch. 884; *Jungbluth v. Way*, 1 Hurl. & N. 71. But it is sufficient if he holds under a blank indorsement as executor, *Tisdale v. Maxwell*, 58 Ala. 40; or receiver, *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13; or under a general assignment, *Burnap v. Cook*, 32 Ill. 168; or by inadvertence of its clearing-house clerk in marking a note "Paid," without funds to meet it at the plaintiff's bank where it was made payable, *Manufacturers' Nat. Bank v. Thompson*, 120 Mass. 438. And an indorsee may sue for the payee at his request after payment by him, and not be subject to the defense of usury between the original parties. *Brigham v. Marean*, 7 Pick. (Mass.) 40. The legal title, and not the beneficial interest, is the thing considered. *Henderson v. Davisson*, 157 Ill. 379, 41 N. E. 560.

⁶⁴³ *Benj. Chalm. Dig.* art. 141; 2 Daniel, Neg. Inst. 228; 2 Pars. Notes & B. 437; *Pearce v. Austin*, 4 Whart. (Pa.) 480; *Guernsey v. Burns*, 25 Wend. (N. Y.) 411; *Caldwell v. Lawrence*, 84 Ill. 161; *Scionneaux v. Waguespack*, 32 La. Ann. 283; *Case v. Watson*, 21 La. Ann. 731; *Richardson v. Fenner*, 10 La. Ann. 599; *Thompson v. Cartwright*, 1 Tex. 87. But not where the note was wrongfully obtained by the holder from the owner. *Lockridge v. Nuckolls*, 25 Ill. 178.

porate power to purchase the paper.⁶⁴⁴ Where the statute requires suit to be brought by the real party in interest, one who holds under a blank indorsement has, in general, such property in the paper as will sustain an action in his own name.⁶⁴⁵ But in such case, although the possession carries with it presumption of title in the plaintiff, the defendant may show that he has no such title.⁶⁴⁶ And possession raises no presumption of title against the legal owner and payee.⁶⁴⁷ So, possession by A. of a note payable to the "A. B. Company" will not be sufficient evidence of A.'s title as identical with the company.⁶⁴⁸ But where A. finds a bank note, and deposits it for the owner's use with the defendant, and the owner is not found, A. may recover from the depositary, being entitled against all the world except the real owner.⁶⁴⁹ So, where a note is taken up by the accommodation indorsers, A. and B., and delivered to A., he may sue the maker as the party in interest.⁶⁵⁰ And several may sue as holders under a blank indorsement, without proof of any joint interest among themselves,⁶⁵¹ even where they are successive indorsers in blank.⁶⁵² So, under a blank indorsement to a firm, the surviving partners may sue as holders without averring the death of a partner and their survivorship.⁶⁵³ But it has been held that where a bill is indorsed in blank, and delivered to A. as trustee for C., A. and B. cannot bring suit upon it without proof of their title.⁶⁵⁴

⁶⁴⁴ *National Pemberton Bank v. Porter*, 125 Mass. 333.

⁶⁴⁵ *Rich v. Starbuck*, 51 Ind. 87. But under the New York Code it is not sufficient to aver that the payee of a note indorsed it in blank, "and that there is now due to the plaintiff on the note" so much, without other statement of his interest in the note. *Lord v. Chesebrough*, 4 Sandf. 696.

⁶⁴⁶ *Hays v. Hathorn*, 74 N. Y. 486, reversing 10 Hun (N. Y.) 511. But it is sufficient if the legal title is in the plaintiff, although the equitable ownership is in another. *Farwell v. Hübner*, 15 Hun (N. Y.) 280.

⁶⁴⁷ *Holly v. Holly*, 94 N. C. 670.

⁶⁴⁸ *Redmond v. Stansbury*, 24 Mich. 445.

⁶⁴⁹ *Bridges v. Hawkesworth*, 21 Law J. Q. B. 75.

⁶⁵⁰ *Havens v. Huntington*, 1 Cow. (N. Y.) 387.

⁶⁵¹ *Benj. Chalm. Dig.* art. 143; *Chit. Bills*, 606; 2 *Daniel, Neg. Inst.* 230; 2 *Pars. Notes & B.* 439; *Ord v. Portal*, 3 Camp. 239; *Rordasz v. Leach*, 1 *Starkie*, 446.

⁶⁵² *Low v. Copestake*, 3 Car. & P. 300.

⁶⁵³ *Attwood v. Rattenbury*, 5 Moore, 209.

⁶⁵⁴ *Machell v. Kinnear*, 1 *Starkie*, 499.

Action by Holder without Title.

§ 1650. The holder of a bill cannot bring suit upon it, if he has no interest, and sues against the will of the real owner,⁶⁵⁵ or if the absolute legal title is in another.⁶⁵⁶ But a holder may bring suit in his own name for the use of the real owner, without any beneficial interest in the paper, provided he has the legal title,⁶⁵⁷ especially where such suit is at the request of the owner, as well as for his benefit,⁶⁵⁸ although originally brought without his knowledge, and subsequently adopted by him.⁶⁵⁹ And such suit may even be brought for the owner in the name of a fictitious person.⁶⁶⁰ The holder in possession of a bill under a blank indorsement may sue, although he is only a pledgee, or holds it as trustee,⁶⁶¹ and although the note belongs to another under a pledge as collateral.⁶⁶²

Where the owner of a note payable to bearer dies, the executor may

⁶⁵⁵ *Towne v. Wason*, 128 Mass. 517. So, where the real owner forbids payment to the bearer, who is only his agent, *Comstock v. Hoag*, 5 Wend. (N. Y.) 600; and especially where the action is brought by a mere trustee against the real party in interest, *Oberle v. Schmidt*, 86 Pa. St. 221.

⁶⁵⁶ *Whiteford v. Burckmyer*, 1 Gill (Md.) 127; *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999. E. g. where the note was in the possession of a witness and produced on subpoena as his own property. *Cobb v. Tirrell*, 141 Mass. 459, 5 N. E. 828. So, where the owner of a note payable to bearer died intestate, and, to save expense, an "agent" was appointed to settle the estate, and he brought suit on the note, without the appointment of an administrator. *Richardson v. Gower*, 10 Rich. Law (S. C.) 109. But see, contra, *Wheeler v. Johnson*, 97 Mass. 39, where action was brought by the consent of the owner, by a holder in possession, who was afterwards appointed administrator de bonis non of the deceased holder.

⁶⁵⁷ 2 Daniel, Neg. Inst. 218; 2 Pars. Notes & B. 443; *Story*, Prom. Notes, § 3; *Wimblish v. Holt*, 26 Tex. 673; *Hartshorn v. Green's Adm'rs*, 1 Minn. 92 (Gill. 71). In such action any defense is admissible which is available against the real owner. *Farwell v. Tyler*, 5 Iowa, 535.

⁶⁵⁸ *Spofford v. Norton*, 126 Mass. 533; *O'Brien v. Sauls*, 2 Rich. Law (S. C.) 332. So, the treasurer may sue as bearer for an unincorporated association on a note payable to bearer. *Tilbetts v. Blood*, 21 Barb. (N. Y.) 650

⁶⁵⁹ *Golder v. Foss*, 43 Me. 364.

⁶⁶⁰ *Ogilby v. Wallace*, 2 Hall (N. Y.) 553.

⁶⁶¹ 2 Daniel, Neg. Inst. 228; 2 Pars. Notes & B. 437; *Wells v. Schoonover*, 9 Heisk. (Tenn.) 805.

⁶⁶² *Greer v. Woolfolk*, 60 Ga. 623; *Williams v. Jones*, 79 Ala. 119. But not (2351)

sue either as executor or in his own name as bearer.⁶⁶³ And even a foreign administrator may sue as bearer.⁶⁶⁴ So, the manager of an insolvent bank may sue as trustee for stockholders under a blank indorsement to the bank.⁶⁶⁵ Or suit may be brought in the name of any holder under such blank indorsement, where the bank is in the hands of a receiver.⁶⁶⁶ But a mere depositary, having no title or authority to sue, cannot bring suit upon a bill, even though it is payable to bearer.⁶⁶⁷

Action by "Party in Interest."

§ 1651. An action must be brought in the name of the lawful holder and owner of the paper, except where the statute authorizes suit by a trustee or otherwise.⁶⁶⁸ But, where the statute requires suit to be brought by "the real party in interest," the plaintiff must show himself to be such, and mere legal title is not sufficient.⁶⁶⁹ Where the plaintiff, however, declares himself expressly as legal owner, and this is not denied in the pleadings, the defendant cannot afterwards set up that the note was not indorsed to him or owned by him.⁶⁷⁰ And he cannot, in his plea, admit an assignment to the plaintiff, and deny his title, without special averment of facts tending to call it in ques-

without the pledgee's consent. *Alabama Terminal & Improvement Co. v. Knox*, 115 Ala. 567, 21 South. 495.

⁶⁶³ *Brooks v. Floyd*, 2 McCord (S. C.) 364; *Crosthwait v. Misener*, 13 Bush (Ky.) 543; *Ricard v. Harrison*, 19 La. Ann. 181.

⁶⁶⁴ *Robinson v. Crandall*, 9 Wend. (N. Y.) 425; *Barrett v. Barrett*, 8 Me. 353.

⁶⁶⁵ *Law v. Parnell*, 7 C. B. (N. S.) 282.

⁶⁶⁶ *Baker v. Stinchfield*, 57 Me. 363.

⁶⁶⁷ 2 *Daniel*, Neg. Inst. 219; 2 *Pars. Notes & B.* 444; *Sherwood v. Roys*, 14 Plck. (Mass.) 172.

⁶⁶⁸ 2 *Daniel*, Neg. Inst. 230; 2 *Edw. Bills & N.* § 923. And the defendant may show that the plaintiff had no title. *Lockwood v. Underwood*, 16 Hun (N. Y.) 592; *Waggoner v. Colvin*, 11 Wend. (N. Y.) 27; *Woodsum v. Cole*, 69 Cal. 142, 10 Pac. 331; *Protection Ins. Co. v. Bill*, 31 Conn. 534; *Reynolds v. Kent*, 38 Mich. 246; *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644; *Davis v. Bradley*, 26 La. Ann. 555.

⁶⁶⁹ *Parker v. Totten*, 10 How. Prac. (N. Y.) 233. But an equitable title is sufficient, *Seattle Nat. Bank v. Emmons*, 16 Wash. 585, 48 Pac. 262, and the want of it, a defense, *Bacon v. Scott*, 154 Pa. St. 250, 26 Atl. 422. And an indorsee "for collection" may sue. *Elmquist v. Markoe*, 45 Minn. 305, 47 N. W. 970; *Lehman v. Press* (Iowa) 76 N. W. 818.

⁶⁷⁰ *Manegold v. Dulau*, 30 Wis. 541.

tion.⁶⁷¹ Where there are rival suits pending, however, the defendant may have an interpleader, and will be liable only to the party actually entitled as holder.⁶⁷²

The holder of a bill is *prima facie* the party in interest,⁶⁷³ although he holds under an indorsement from the payee, with an agreement that nothing shall be paid by him until collected.⁶⁷⁴ And where an owner brings suit, and it appears that the note is held by a bank for collection, with the right to apply the proceeds upon a debt against the owner, a finding by the jury of legal title in the plaintiff will not be disturbed by the court, although it implies a conclusion of law.⁶⁷⁵ Under the Missouri Code the holder of a nonnegotiable note may sue in his own name as the real party in interest.⁶⁷⁶ And, where the payee sues on a nonnegotiable note which is lost, he will be presumed to be the owner.⁶⁷⁷ One of several joint owners cannot, however, bring suit without joining the others, although the note is in his possession, and payable to bearer.⁶⁷⁸

But, where a note is payable nominally to a bank, the actual owner may bring suit upon it in the name of such payee,⁶⁷⁹ or he may sue as assignee of the original payee, even without his knowledge or consent.⁶⁸⁰ And, in the absence of a statute to the contrary, the owner

⁶⁷¹ *Swift v. Ellsworth*, 10 Ind. 205. And the answer must show in whom the real title is. *Elder v. Smith*, 16 Ind. 466. But the maker cannot question the payee's title as party in interest. *Blacker v. Dunbar*, 108 Ind. 217, 9 N. E. 104; *Johnson v. Conklin*, 119 Ind. 109, 21 N. E. 462.

⁶⁷² *Rohrer v. Turrill*, 4 Minn. 407 (Gil. 309).

⁶⁷³ *Willard v. Moles*, 30 Mo. 142, although the protest was made for another bank, *Kunkel v. Spooner*, 9 Md. 462.

⁶⁷⁴ *Cummings v. Morris*, 25 N. Y. 625.

⁶⁷⁵ *Prescott v. Leonard*, 32 Kan. 142, 4 Pac. 172.

⁶⁷⁶ *Bennett v. Pound*, 28 Mo. 598.

⁶⁷⁷ *Price v. Dunlap*, 5 Cal. 483.

⁶⁷⁸ *McNamee v. Carpenter*, 56 Iowa, 276, 9 N. W. 218.

⁶⁷⁹ *President, etc., of Bank of Chenango v. Hyde*, 4 Cow. (N. Y.) 567; *Tucker v. Tucker*, 119 Mass. 81; *Moore v. Penn*, 5 Ala. 185; or even in his own name, treating the payee as fictitious, *In re Pendleton Hardware & Implement Co.*, 24 Or. 330, 33 Pac. 544. Thus, the indorser who takes up a note at maturity may bring suit in the name of his indorsee. *Bank of America v. Senior*, 11 R. I. 376. But in South Carolina the payee of a sealed note cannot sue in his own name for the use of an equitable owner. *Sullivan v. Hellams*, 6 S. C. 164.

⁶⁸⁰ *Gage v. Kendall*, 15 Wend. (N. Y.) 640.

may bring suit on a bill or note in the name of any third person,⁶⁸¹ or in a fictitious name.⁶⁸²

Transfer Pending Suit.

§ 1652. If the plaintiff transfers the bill after commencing suit, his suit will abate.⁶⁸³ And mere delivery to another after suit brought, under blank indorsement made to the plaintiff, will have the same effect, although he agrees with the new holder to continue the suit for his benefit.⁶⁸⁴ But if he makes a transfer with the defendant's consent, and with a power of attorney to the indorsee to continue the suit for his own benefit, the defendant will be estopped from objecting to its continuance.⁶⁸⁵ So, if an intermediate indorser takes up a note after suit brought against the maker by his indorsee, the suit may continue for his use.⁶⁸⁶

On the other hand, an indorsee without notice of any pending suit may bring a fresh action in his own name,⁶⁸⁷ although it has been held that an indorsee with notice could not do so.⁶⁸⁸

⁶⁸¹ *Patten v. Moses*, 49 Me. 255; *Demuth v. Cutler*, 50 Me. 298; *Golder v. Foss*, 43 Me. 364. And he may show that a former suit was brought for convenience in a collecting agent's name, and was afterwards discontinued. *Hatters' Bank v. Phillips*, 38 N. Y. 128.

⁶⁸² *Epting v. Jones*, 47 Ga. 622.

⁶⁸³ *Lee v. Jilson*, 9 Conn. 94; *Hall v. Gentry*, 1 A. K. Marsh. (Ky.) 555; although retransferred to him before trial, *Vila v. Weston*, 33 Conn. 42. But an answer denying that the defendant holds any such note as that mentioned in the declaration only puts in issue his title at the beginning of the suit. *Allen v. Newberry*, 8 Iowa, 65.

⁶⁸⁴ *Curtis v. Bemis*, 26 Conn. 1. But in Texas the suit may be amended and continued for the benefit of the assignee. *Dowell v. Mills*, 32 Tex. 440. And parol evidence is admissible in Connecticut to show that a purchase, and not a payment, was intended, although by a stranger, and made for an indorser of the note, and the action may in such case continue for his benefit. *Comstock v. Savage*, 27 Conn. 184.

⁶⁸⁵ *Central Bank v. Curtis*, 26 Conn. 533.

⁶⁸⁶ *Ticonic Nat. Bank v. Bagley*, 68 Me. 249.

⁶⁸⁷ *Colombies v. Slim*, 2 Chit. 637. And the pendency of a prior action begun by his indorser will be no defense against him. *Deuters v. Townsend*, 5 Best. & S. 613.

⁶⁸⁸ *Benj. Chalm. Dig. art. 135*; *Chit. Bills*, 256; *Marsh v. Newell*, 1 Taunt. 109.

Action by Owner without Indorsement.

§ 1653. At common law the beneficial owner of a bill or note without indorsement cannot sue in his own name, unless the paper is transferable by delivery,⁶⁸⁹ and cannot even recover on the common counts.⁶⁹⁰ He may, however, bring his action in the name of the payee or last holder of the legal title.⁶⁹¹ And it has been held that he may do so even without the authority of such former holder.⁶⁹²

If there is no legal holder (e. g. where the last legal holder transferred the note without indorsement, and afterwards died intestate, and no legal representative has since been appointed), the owner may sue in equity in his own name.⁶⁹³ And the real owner by delivery without indorsement may intervene, in Indiana, by a cross complaint in a suit brought against the maker by a subsequent indorsee, and have his rights determined in such suit.⁶⁹⁴ When such owner sues in equity in his own name, he must prove his title,⁶⁹⁵ and he may make his transferee a party to the action.⁶⁹⁶

But at common law the owner of a bill may bring trover against a wrongful holder, although he is not a party to it.⁶⁹⁷ So, one who pledges a note without indorsing it may bring suit for negligence

⁶⁸⁹ Byles, Bills, 157; Chit. Bills, 275; 2 Daniel, Neg. Inst. 233; 2 Pars. Notes & B. 439; Marsh v. Hayford, 80 Me. 97, 13 Atl. 271. And see §§ 790, 791, *supra*.

⁶⁹⁰ Royce v. Nye, 52 Vt. 372.

⁶⁹¹ Chit. Bills, 608; 2 Daniel, Neg. Inst. 233; 2 Pars. Notes & B. 448; Pease v. Hirst, 10 Barn. & C. 122, 5 Man. & R. 88; Freeman v. Perry, 22 Conn. 617; Amherst Academy v. Cowls, 6 Pick. (Mass.) 427; Mechanics' Sav. Bank v. Goff, 13 R. I. 516; Benson v. Abbott, 95 Ga. 69, 22 S. E. 127; Dunn v. Meserve, 58 N. H. 429. And he may sue in the same manner upon a note taken by the sheriff to such nominal plaintiff for his benefit in the original suit. Hariman v. Hill, 14 Me. 127. If the payee is dead, a holder without indorsement from his widow should sue in the name of his legal representatives, at law and not in equity. Nash v. Hogan, 45 N. J. Eq. 108, 16 Atl. 433.

⁶⁹² Wilson v. Clark, 11 Ind. 385.

⁶⁹³ Taylor v. Reese, 44 Miss. 89.

⁶⁹⁴ Clark v. Brown, 70 Ind. 405.

⁶⁹⁵ Caldwell v. Mesheuw, 44 Ark. 564.

⁶⁹⁶ Heartman v. Franks, 30 Ark. 501. And this has been held to be necessary. Perry v. Seitz, 2 Duv. (Ky.) 122.

⁶⁹⁷ Byles, Bills, 412; Treuttel v. Barandon, 8 Taunt. 100, 1 Moore, 543.

against a collecting agent, in whose hands it had been placed by his pledgee.⁶⁹⁹ And the owner of a note without indorsement may take judgment under a warrant to confess judgment in favor of the holder.⁷⁰⁰

§ 1654. Under the statutes already referred to, requiring the action to be brought by the real party in interest, such a holder, although without formal indorsement, may sue in his own name,⁷⁰¹ especially where his title is admitted by the answer.⁷⁰² And it is sufficient if the note is payable to a partnership and delivered to the plaintiff by one partner,⁷⁰³ or is indorsed to the plaintiff after the beginning of the action,⁷⁰⁴ or is delivered by the payee with an express refusal to indorse it,⁷⁰⁵ or even if it was payable to a corporation, and still held by it at the time of its dissolution.⁷⁰⁶ And one who purchases in Massachusetts at an assignee's sale acquires the legal title without indorsement, and may sue in his own name.⁷⁰⁷ But the holder of a check

⁶⁹⁹ *McKinster v. Bank*, 9 Wend. (N. Y.) 46, 11 Wend. (N. Y.) 473.

⁷⁰⁰ *Clements v. Hull*, 35 Ohio St. 141.

⁷⁰¹ *Savage v. Bevier*, 12 How. Prac. (N. Y.) 166; *Central Bank v. Lang*, 1 Bow. (N. Y.) 202; *Billings v. Jane*, 11 Barb. (N. Y.) 620; *Andrews v. McDaniel*, 68 N. C. 385; *Willey v. Gatling*, 70 N. C. 410; *Jackson v. Love*, 82 N. C. 405; *Robertson v. Dunn*, 87 N. C. 191; *Kiff v. Weaver*, 94 N. C. 274; *Boeka v. Neella*, 28 Mo. 180; *Lewis v. Bowen's Adm'r*, 29 Mo. 202; *Willard v. Moles*, 30 Mo. 142; *Harvey v. Brooke*, 36 Mo. 493. So, the wife may sue on a note made to her husband for purchase money of her separate property. *Grantham v. Payne*, 77 Ala. 584. So, where the note sued on was delivered to the plaintiff in renewal of a note held by him. *Moore v. Miller*, 6 Or. 254. So, where the plaintiff holds for collection with authority to pay himself out of the proceeds an amount due from the payee. *Gillisple v. Railroad Co.*, 12 Ind. 398. So, the assignee of a duebill must sue in Missouri in his own name, and not in that of the assignor. *Brady v. Chandler*, 31 Mo. 28.

⁷⁰² *Fenwick v. Phillips*, 3 Metc. (Ky.) 87.

⁷⁰³ *Banking House of Bartholow, Lewis & Co. v. St. Joseph Lead Co.*, 12 Mo. App. 587.

⁷⁰⁴ *Weeks v. Medler*, 20 Kan. 57. But where the plaintiff holds by a written assignment after suit brought, he must show that he was the equitable owner at the commencement of the suit. *Weinwick v. Bender*, 33 Mo. 80.

⁷⁰⁵ *Van Riper v. Baldwin*, 19 Hun (N. Y.) 344.

⁷⁰⁶ *Hyde v. Lawrence*, 49 Vt. 361.

⁷⁰⁷ *Stone v. Hubbard*, 7 Cush. 595. So, of a witnessed note payable to two payees, and purchased by one who sued in the name of both. *Drury v. Vannevar*, 5 Cush. 442.

without the payee's indorsement can recover against the drawer, although payment had been countermanded by him, but only on proof of the consideration paid.⁷⁰⁷

Discount Refused by Nominal Payee.

§ 1655. Where a note is made payable to A. for the purpose of being discounted by him, and on his refusal it is discounted by B., the latter may sue the makers (both principal and surety) in the name of the nominal payee.⁷⁰⁸ And he may recover in an action of trover brought in the payee's name against the receiver of the bank at which it was made payable, and to which it had been forwarded for payment.⁷⁰⁹ In Indiana he may bring suit in his own name against the maker, and the payee is not a necessary party to the suit.⁷¹⁰ But the payee's consent, either express or implied, is necessary to support such action.⁷¹¹ An action lies, in like manner, against an accommodation indorser who signs as surety for the maker.⁷¹² And it is said that the

⁷⁰⁷ *Farris v. Wells*, 68 Ga. 604.

⁷⁰⁸ *Utica Bank v. Ganson*, 10 Wend. (N. Y.) 313; *Bank of Rutland v. Buck*, 5 Wend. (N. Y.) 66; *Cross v. Rowe*, 22 N. H. 77; *Hunt v. Aldrich*, 27 N. H. 31. So, by the payee's consent. *Bank of Middlebury v. Bingham*, 33 Vt. 621. So, where the plaintiff holds the note as collateral, *Bank of Newbury v. Rand*, 38 N. H. 166; or where the payee holds it by agreement as trustee for the real plaintiff, who advanced the money upon it, *President, etc., of Bank of Chenango v. Hyde*, 4 Cow. (N. Y.) 567. So, where it was made at B.'s request and for his benefit, to be credited to him by the payee, A., and it is refused by A., B. may sue the maker in A.'s name. *Overman v. Grier*, 70 N. C. 693. So, where the note was made by one partner in the name of his firm, and the indorsement of the payee was forged by him, and the note was then discounted by the plaintiff, *York Bank v. Asbury*, 1 Bliss. 230, Fed. Cas. No. 18,142; or where the plaintiff held a nonnegotiable note under an unauthorized indorsement by the cashier of the nominal payee, *Barrick v. Austin*, 21 Barb. (N. Y.) 241.

⁷⁰⁹ *Corn Exch. Bank v. Blye*, 2 N. Y. St. Rep. 112.

⁷¹⁰ *Rhyan v. Dunnigan*, 76 Ind. 178; especially where the plaintiff, as part of the consideration, canceled a judgment held by him against the maker, *Spurrier v. Briggs*, 17 Ind. 529.

⁷¹¹ *Skowhegan Bank v. Baker*, 36 Me. 154; *Allen v. Ayers*, 3 Pick. (Mass.) 298; *Adams Bank v. Jones*, 16 Pick. (Mass.) 574. But see, contra, *Farmers' & Mechanics' Bank v. Humphrey*, 36 Vt. 554.

⁷¹² *Commercial Bank v. Claiborne*, 5 How. (Miss.) 301.

plaintiff may bring suit in the name of the payee, or declare on the note as payable to bearer, or to himself by the name of the payee.⁷¹³ Many cases hold, however, that the surety is discharged if the note is discounted by any other than the intended payee, and that no recovery can be had against him, even in the payee's name.⁷¹⁴

Title without Possession.

§ 1656. The plaintiff must be the holder as well as the owner of the paper on which he brings suit. If it is actually held by a third party, it will, in general, defeat his action,⁷¹⁵ since the defendant is entitled to have it produced and surrendered on payment. And this is true, *a fortiori*, where it is held adversely by another.⁷¹⁶ But it has been held that the tender to B. of a note made by A., under the payee's agreement with B. for goods purchased, makes it B.'s property, and will support an action by B. against A., although it was refused by B., and, after being held some time for him, was sold by the payee to C. conditionally, and afterwards destroyed by fire while still in the payee's possession.⁷¹⁷ So, the pledgee of a note may sue upon it while still in the pledgor's possession.⁷¹⁸ And the possession of a third party for the plaintiff by agreement of the parties will not prevent the plaintiff's recovery.⁷¹⁹ In like manner, an agent's possession

⁷¹⁴ *Elliot v. Abbot*, 12 N. H. 549. In this case the note was indorsed afterwards by the payee, and discounted by the plaintiff, with the consent of the surety.

⁷¹⁵ *Manufacturers' Bank v. Cole*, 39 Me. 188; *Granite Bank v. Ellis*, 43 Me. 387; *Dewey v. Cochran*, 49 N. C. 184; *Clinton Bank v. Ayres*, 16 Ohio. 282; *Farmers' & Mechanics' Bank v. Hathaway*, 36 Vt. 539.

⁷¹⁶ *Hook v. Murdoch*, 38 Mo. 224. But the payee may recover on a check procured by another in his name for money due him, and paid to such other person on his forging an indorsement of the payee's name. *Dodge v. Bank*, 20 Ohio St. 234, 30 Ohio St. 1.

⁷¹⁷ *Crandall v. Schroeppel*, 1 Hun (N. Y.) 557; although held under a mere verbal assignment, *Burton v. Dees*, 4 Yerg. (Tenn.) 4. So, of a check, although indemnity is offered. *Van Alstyne v. Bank*, 4 Abb. Dec. (N. Y.) 449.

⁷¹⁸ *Des Arts v. Leggett*, 16 N. Y. 582.

⁷¹⁹ The recovery being as trustee for the pledgor for all excess above the amount due to the pledgee. *Stones v. Butt*, 2 Crompt. & M. 416.

⁷²⁰ *Selden v. Pringle*, 17 Barb. (N. Y.) 458.

is that of his principal, and the principal may bring trespass against one who has taken the note from the possession of his agent.⁷²⁰

Action by Agent—Collecting Agent.

§ 1657. Where a bill or note is made payable expressly to one person as agent for another, the agent who is named as payee may sue upon it in his own name.⁷²¹ And it has been held that the principal may bring the action in his own name on proving his property in the bill,⁷²² even though his name is not disclosed in the instrument.⁷²³ So, where a note is payable to "A. B., cashier," action may be brought on it by A. B.,⁷²⁴ even after the bank has ceased to exist,⁷²⁵ or it may be brought by the bank as owner,⁷²⁶ especially where the principal is named in the note; e. g. by making it payable to "A. B., cashier of the First National Bank of L."⁷²⁷ So, where a note is payable to "A. B., treasurer of the C. Co.," the title is often treated as mere description, and the suit may be brought in the name of A. B.⁷²⁸ And A. B., or his successor in office, may sue on a note payable to A. B. as treasurer,

⁷²⁰ *Gillett v. Ball*, 9 Pa. St. 13.

⁷²¹ 2 *Daniel*, Neg. Inst. 236; 2 *Pars. Notes & B.* 451; *Buffum v. Chadwick*, 8 *Mass.* 103; *Pearce v. Austin*, 4 *Whart. (Pa.)* 489; *Zapata v. Cifreo*, 26 *La. Ann.* 87; *Rutherford v. Mitchell*, *Mart. & Y. (Tenn.)* 261. And see § 156, *supra*. So, on a note to "A., lawful attorney of B.," A. may sue. *Austell v. Rice*, 5 *Ga.* 472.

⁷²² *Southern Life Insurance & Trust Co. v. Gray*, 3 *Fla.* 262; *Harrow v. Dugan*, 6 *Dana (Ky.)* 341; *Stinson v. Sachs*, 8 *Wash.* 391, 36 *Pac.* 287.

⁷²³ *Pacific Guano Co. v. Holleman*, 4 *Woods*, 462, 12 *Fed.* 61. So, upon a nonnegotiable note payable to "A. B., agent." *National Life Ins. Co. v. Allen*, 116 *Mass.* 398.

⁷²⁴ *Rose v. Laffan*, 2 *Speers (S. C.)* 424. And see § 157, *supra*. But see, *contra*, *Olcott v. Rathbone*, 5 *Wend. (N. Y.)* 490.

⁷²⁵ *Horah v. Long*, 20 *N. C.* 274. And see § 156, *supra*.

⁷²⁶ *Watervliet Bank v. White*, 1 *Denio (N. Y.)* 608; *Wright v. Boyd*, 3 *Barb. (N. Y.)* 523; *Dupont v. Ferry Co.*, 9 *Rich. Law (S. C.)* 255; *Darby v. Bank*, 97 *Ala.* 643, 11 *South.* 881; *Hobbs v. Bank*, 97 *Ga.* 524, 25 *S. E.* 348. And see § 157, *supra*.

⁷²⁷ *Nave v. Bank*, 87 *Ind.* 204.

⁷²⁸ *Alston v. Heartman*, 2 *Ala.* 699; *Martin v. Lamb*, 77 *Ga.* 252, 3 *S. E.* 10. But the corporation cannot sue in its own name without indorsement. *Fine v. High Bridge M. E. Church*, 44 *N. J. Law*, 148. And his successor in office cannot sue. *Nash v. Russell*, 5 *Barb. (N. Y.)* 556.

"or his successors."⁷²⁰ So, it has been held that a town may bring suit upon a note payable to "A. B., town treasurer, or his successor,"⁷²⁰ or that the payee may sue individually on a note describing him as "school commissioner and agent of the town."⁷²¹

§ 1658. — Where the note is made payable to a factor or agent in his individual name, he may, in general, bring suit in that name, although he is a mere trustee.⁷²² And the action will not abate by reason of the death of the principal before judgment.⁷²³ But an agent who takes up a note for an indorser cannot sue his principal as indorser, although he paid for it with his own money.⁷²⁴ One who holds a note as agent for collection may, unless it is otherwise provided by statute, bring suit on it in his own name,⁷²⁵ whether he holds the paper as "bearer,"⁷²⁶ or by an indorsement in blank,⁷²⁷ or expressly "for collection."⁷²⁸

⁷²⁰ *Clap v. Day*, 2 Me. 305, where the action was by the payee; *Taintor v. Winter*, 53 Me. 348, where the action was brought by his successor. And A., B., and C. may sue in their own names on a note payable to them "and their successors, trustees of the N. M. Academy." *Binney v. Plumley*, 5 Vt. 500. On the other hand, the successor in office is the proper plaintiff where the note is payable to the treasurer of the company, without naming him. *McDonald v. Laughlin*, 74 Me. 480. And see § 156, *supra*.

⁷²¹ *Town of Arlington v. Hinds*, 1 D. Chip. (Vt.) 431.

⁷²² *McConnel v. Thomas*, 3 Ill. 313.

⁷²³ *Smith v. Burton*, 3 Vt. 233; *Ridgely Nat. Bank v. Patton*, 100 Ill. 479; *Minnesota Thresher Mfg. Co. v. Helper*, 49 Minn. 395, 52 N. W. 33; especially where he has credited the principal with the note and surrendered security held by him, *Fish v. Jacobsohn*, 2 Abb. Dec. (N. Y.) 132, 5 Bosw. (N. Y.) 514; or has paid the principal the amount due upon it, *Coy v. Stiner*, 53 Mich. 42, 18 N. W. 552; and although the statute requires the action to be brought by the real party in interest, *Stoll v. Sheldon*, 13 Neb. 207, 13 N. W. 201.

⁷²⁴ *Royce v. Barnes*, 11 Metc. (Mass.) 276.

⁷²⁵ *Dodge v. Brown*, 113 Mass. 323.

⁷²⁶ *Regina Flour-Mills Co. v. Holmes*, 156 Mass. 11, 30 N. E. 176; *Wintermute v. Torrent*, 83 Mich. 555, 47 N. W. 358; *Watkins v. Plummer*, 93 Mich. 215, 53 N. W. 165; *Carpenter v. Cummings*, 18 Misc. Rep. 587, 42 N. Y. Supp. 239. And he is the party in interest, within the meaning of the Missouri Code, *Webb v. Morgan*, 14 Mo. 429; *Cummings v. Kohn*, 12 Mo. App. 585; although he sues "to the use of" the principal, *Beattie v. Lett*, 28 Mo. 596.

⁷²⁷ *Pettee v. Prout*, 3 Gray (Mass.) 502; *Gregory v. McNealy*, 12 Fla. 578; *Moore v. Penn*, 5 Ala. 135.

⁷²⁸ *Beekman v. Wilson*, 9 Metc. (Mass.) 434; *Irwin v. Bailey*, 8 Biss. 523,

⁷²⁹ *Boyd v. Corbitt*, 37 Mich. 52.

The authority to sue may even be conferred by the principal after the suit is begun.⁷³⁹ The agent cannot sue, however, after payment to him has been countermanded,⁷⁴⁰ or his authority expressly revoked.⁷⁴¹ And in general an action brought by an agent is subject to any defense that would be available against the principal.⁷⁴² In some of the United States, however, it is held that a mere collecting agent has no such interest in a bill or note in his hands for collection as is necessary to support an action upon it.⁷⁴³ But a distinction is made, even in such states, where the collecting agent is to look to the proceeds of the paper for the expenses of collection, and becomes a party in interest by assuming the risk of such expenses.⁷⁴⁴

Action by Trustee.

§ 1659. The payee named in a note or indorsement may bring suit on it in his own name, although he holds it as trustee for another,⁷⁴⁵

Fed. Cas. No. 7,079; *Sterling v. Trading Co.*, 11 Serg. & R. (Pa.) 179; *King v. Fleece*, 7 Heisk. (Tenn.) 273; *Woollen v. Vankirk*, 61 Ind. 497. So, although the note was indorsed to him to collect without express power of suit, and he was indebted to the indorsee. *Adams v. Oakes*, 6 Car. & P. 70.

⁷³⁹ Whether the suit is brought in the name of the principal, *Ancona v. Marks*, 7 Hurl. & N. 686; *Craig v. Twomey*, 14 Gray (Mass.) 486; or of the agent. *Marr v. Plummer*, 3 Me. 73.

⁷⁴⁰ *Barker v. Prentiss*, 6 Mass. 430.

⁷⁴¹ *Southwick v. Ely*, 15 N. H. 541.

⁷⁴² *Royce v. Barnes*, 11 Metc. (Mass.) 276; *Hodge v. Comly*, 2 Miles (Pa.) 296; *Ran v. Latham*, 11 La. Ann. 270. But the mere fact that he is the general agent of the corporation will not subject him to a set-off against the corporation. *Pettee v. Prout*, 3 Gray (Mass.) 502.

⁷⁴³ *Thatcher v. Winslow*, 5 Mason, 58, Fed. Cas. No. 13,868; *Bell v. Tilden*, 16 Hun (N. Y.) 346; *Iselin v. Rowlands*, 30 Hun (N. Y.) 488; *Rock Co. Nat. Bank v. Hollister*, 21 Minn. 385; *Wood v. Tyson*, 13 La. Ann. 104; *Nichols v. Gross*, 26 Ohio St. 425. But see *White v. Stanley*, 29 Ohio St. 422. And before the enactment of the present statute in New York. *Herrick v. Carman*, 10 Johns. (N. Y.) 224; *Mauran v. Lamb*, 7 Cow. (N. Y.) 174. And see statutory prohibition as to attorneys in New York (Code Civ. Proc. § 873); *Carpenter v. Cummings*, 20 Misc. Rep. 661, 46 N. Y. Supp. 252.

⁷⁴⁴ *Devot v. Barnes*, 7 Hun. (N. Y.) 342; *Eaton v. Alger*, 47 N. Y. 345; *French v. Jarvis*, 29 Conn. 347.

⁷⁴⁵ *Smith v. Kendall*, 1 Esp. 231, 6 Term R. 123; *Randoll v. Bell*, 1 Maule & S. 723; *Nicolay v. Fritschle*, 40 Mo. 67.

and although he is expressly named as "trustee for B.,"⁷⁴⁶ or as receiver,⁷⁴⁷ or assignee in bankruptcy,⁷⁴⁸ or guardian.⁷⁴⁹ So, if a note is made to A. as trustee for an unincorporated society, the action may be brought in his name without joining the other members of the society.⁷⁵⁰ In like manner, if notes are transferred by a corporation to A. to secure creditors, he may sue as "trustee of an express trust," under the New York statute.⁷⁵¹ So, if the plaintiff holds a note payable to bearer under a bequest to him in trust for another,⁷⁵² or under an agreement with a third person entitling him to half the proceeds.⁷⁵³

Where a bill or note is expressly payable to a trustee, the cestui que trust cannot sue upon it, although his interest as such appears in the instrument itself.⁷⁵⁴ But the actual party in interest has been allowed to sue without indorsement, where the nominal payee was made such to secure a lien that has been satisfied,⁷⁵⁵ or had no interest and was named as payee by the fraud of the plaintiff's agent.⁷⁵⁶ And an acceptor may defeat the action of the nominal payee by showing that he was really a trustee for the drawer, and that the drawer has been satisfied.⁷⁵⁷

⁷⁴⁶ *Davidson v. Elms*, 67 N. C. 228. So, "A., B., trustee," *Rice v. Rice*, 106 Ala. 636, 17 South. 628.

⁷⁴⁷ *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13.

⁷⁴⁸ *Collier v. Barnes*, 64 Ga. 484. And such words, being mere description, do not prevent bringing the suit by the payee in a state court.

⁷⁴⁹ *Shepherd v. Evans*, 9 Ind. 260. And the guardian should sue after the death of the ward, and not the ward's administrator. *Wheelock v. Wheelock*, 5 Vt. 433.

⁷⁵⁰ *Bawden v. Howell*, 3 Man. & G. 638; *O'Brien v. Smith*, 1 Black. 90. So, although the bill sued on was discounted by the society (an unincorporated bank) in its own name. *Burbank v. Beach*, 15 Barb. (N. Y.) 326.

⁷⁵¹ *Clark v. Titcomb*, 42 Barb. 122; *Nelson v. Wellington*, 5 Bosw. 178.

⁷⁵² *Jackson v. Heath*, 1 Bailey (S. C.) 355.

⁷⁵³ And in such case no action can be brought by the cestui que trust. *Brooking v. Clarke*, 2 Litt. (Ky.) 197.

⁷⁵⁴ *Society of Chaplin v. Canada*, 8 Conn. 286; *Grist v. Backhouse*, 20 N. C. 362; *Linn Co. v. Holland*, 12 Mo. 127. So, where a promise is made to A. to accept a bill and pay it when due, and the bill is afterwards transferred to B. as trustee, and is wrongfully destroyed by the drawee, A. cannot sue the drawee on his original promise. *Jungbluth v. Way*, 1 Hurl. & N. 71.

⁷⁵⁵ *Bean v. Dolliff*, 67 Me. 228.

⁷⁵⁶ *Bank of Kansas City v. Mills*, 24 Kan. 604.

⁷⁵⁷ *Thompson v. Clark*, 56 Pa. St. 33.

By Government—Party under Disability.

§ 1660. The government may bring suit in its own name on a bill or note belonging to it, although it is made payable to the treasurer of the United States or other public officer.⁷⁵⁸ This is true also of a state,⁷⁵⁹ and even, it has been held, of a county.⁷⁶⁰ But a note to the treasurer of a parish may be sued by him, although a subsequent indorsement by his successor in office appears on the paper.⁷⁶¹ If, however, a note is given to the treasurer of a city for taxes, and the treasurer had no authority to receive it, and the city never accepted it, suit cannot be brought on it by the treasurer, although named in it as payee.⁷⁶²

For actions brought by or on behalf of married women, or other persons now or formerly under any legal incapacity, the reader is referred to an earlier part of this work.⁷⁶³

⁷⁵⁸ 2 Daniel, Neg. Inst. 226; 2 Pars. Notes & B. 452; U. S. v. Barker, 1 Paine, 156, Fed. Cas. No. 14,517; or to him "or his successors," U. S. v. Boice, 2 McLean, 352, Fed. Cas. No. 14,619. And the United States may sue as indorsee of a note payable "to the order of any person who should indorse." U. S. v. White, 2 Hill (N. Y.) 59. And see §§ 350, 381, supra.

⁷⁵⁹ On a note to a land agent of the state. State v. Boles, 11 Me. 474. And the agent cannot sue individually on such note. Irish v. Webster, 5 Me. 171. And a state may bring suit on a note in the courts of another state. Ealey v. People of Illinois, 23 Kan. 510.

⁷⁶⁰ On bonds given to "the board of supervisors," Board of Sup'rs of Oconto Co. v. Hall, 42 Wis. 59; or upon a note payable to the use of the "state school fund," Barry Co. v. McGlothlin, 19 Mo. 307; but not on a note to G., for the use of the county, Linn Co. v. Holland, 12 Mo. 127.

⁷⁶¹ Buck v. Merrick, 8 Allen (Mass.) 123. And the official successor of A. cannot sue in Indiana on a note payable to A., "agent for W. county, or his successor in office." Upton v. Starr, 3 Ind. 508.

⁷⁶² Crowell v. Osborne, 43 N. J. Law, 335.

⁷⁶³ See § 278, as to infants, and §§ 299, 316, 320, as to married women. The husband may sue as bearer on a note payable to his wife or bearer. Fort v. Brunson, 2 Speer (S. C.) 658. But he cannot sue, after his wife's death, on a note made payable to her without any allegation of title in himself. Craige v. Tingle, 68 Ga. 274.

Action against Parties Severally.

§ 1661. At common law the holder of a bill may bring several simultaneous actions against all or any of the prior parties liable to him.⁷⁶⁴ And the same party may be sued separately as indorser and as acceptor, if so liable, and the last action will not be stayed as vexatious by a court of equity.⁷⁶⁵ It has even been held that a party may be sued in one action as indorser and as executor of the maker.⁷⁶⁶ And a judgment entered against a defendant as executor of both maker and indorser will be good, although the relation of the parties is not specified in the judgment.⁷⁶⁷

Several of the United States provide by statute that the maker and indorsers may be sued separately.⁷⁶⁸ And where such actions are brought separately the plaintiff is entitled to recover costs in each case,⁷⁶⁹ and is liable for them.⁷⁷⁰ Judgment recovered against an indorser, and not satisfied, is no defense in an action brought by the same plaintiff against the maker.⁷⁷¹ So, the plaintiff may recover against an indorser on an averment of judgment recovered against the maker and not satisfied.⁷⁷² But he need not aver that the note has not been paid by an indorser who is not joined in the suit.⁷⁷³ In like manner, proceedings in bankruptcy against the acceptor of a bill

⁷⁶⁴ Byles, Bills, 411; Chit. Bills, 610; 2 Daniel, Neg. Inst. 237; 2 Pass. Notes & B. 458; Bishop v. Hayward, 4 Term R. 471; Knight v. Legh, 6 Law J. C. P. 128; Britten v. Webb, 2 Barn. & C. 483, 3 Dowl. & R. 659.

⁷⁶⁵ Wise v. Prowse, 9 Price, 393.

⁷⁶⁶ Roark v. Turner, 29 Ga. 453.

⁷⁶⁷ Woolfolk v. Kyle, 48 Ga. 419.

⁷⁶⁸ ARKANSAS (Sand. & H. Dig. § 502); KANSAS (Gen. St. c. 115, § 18); MICHIGAN (How. Ann. St. § 7352); NEBRASKA (Comp. St. § 3365); RHODE ISLAND (Gen. Laws, c. 166, § 2); TENNESSEE (Shannon's Code, §§ 3511, 4484); TEXAS (Rev. St. art. 312).

⁷⁶⁹ Austin v. Bemiss, 8 Johns. (N. Y.) 275; Whipple v. Newton, 17 Pick. (Mass.) 168.

⁷⁷⁰ Lewis v. Dalrymple, 3 Dowl. 483.

⁷⁷¹ Russell & Erwin Mfg. Co. v. Carpenter, 5 Hun (N. Y.) 162. So, conversely, the holder may sue the indorser, notwithstanding judgment recovered against the maker. Righter v. Van Riper, 3 N. J. Law, 287.

⁷⁷² Clifford v. Keating, 4 Ill. 250.

⁷⁷³ Page v. Snow, 18 Mo. 128.

are no defense to an action against the indorser.⁷⁷⁴ And even a joint action against the makers of a joint and several note has been held to be no bar to an action against one maker severally.⁷⁷⁵ But in some states the statute provides that not more than one suit shall be brought on one note at the same time.⁷⁷⁶

Action against Indorser—Surety—Diligence.

§ 1662. Where several parties indorse for the accommodation of the maker, and the note is paid by the last of them, he may recover against the prior indorsers the whole amount paid,⁷⁷⁷ or he may at once sue the maker without previously resorting to the payee, although the accommodation was for the latter.⁷⁷⁸ But an indorser, in suing a prior indorser for money paid, must prove the payment made by himself, and it is not sufficient proof to show a previous judgment recovered by his indorsee against the several indorsers.⁷⁷⁹ And an indorsee cannot sue a remote indorser on the common counts for money had and received.⁷⁸⁰

Where a note is assigned by deed, a covenant contained in it, that the note shall be first paid out of the proceeds of the land conveyed, will not render the assignor personally liable for its payment.⁷⁸¹ And an averment in the declaration on a note to the effect that it was assigned in writing is not equivalent to an averment that it was duly indorsed.⁷⁸² While an indorser holds a note as collateral under a reas-

⁷⁷⁴ *Kenworthy v. Hopkins*, 1 Johns. Cas. (N. Y.) 107.

⁷⁷⁵ *Turner v. Whitmore*, 63 Me. 526.

⁷⁷⁶ INDIANA (Horner's Rev. St. § 5516); *Morrison v. Fishel*, 64 Ind. 177. So, in MARYLAND, as to a joint and several note, when the persons executing it are alive and live in the same county (Pub. Gen. Laws, art. 50, § 2).

⁷⁷⁷ *Mason v. Mason*, 3 Cranch, C. C. 648, Fed. Cas. No. 9,245; *Id.*, 4 Cranch, C. C. 401, Fed. Cas. No. 9,246. Or he may transfer the note after paying it, and his indorsee may sue the prior accommodation indorser. *McCarty v. Root*, 21 How. 432.

⁷⁷⁸ *Mullen v. French*, 9 Watts (Pa.) 96.

⁷⁷⁹ *Barker v. Cassidy*, 16 Barb. (N. Y.) 177.

⁷⁸⁰ *Mandeville v. Riddle*, 1 Cranch, 290, reversing 1 Cranch, C. C. 85, Fed. Cas. No. 11,807. And see § 1674, *supra*. Although he might sue such indorser in equity, *Riddle v. Mandeville*, 5 Cranch, 322.

⁷⁸¹ *Richards v. Holmes*, 18 How. 143.

⁷⁸² *Keller v. Williams*, 49 Ind. 504. And the assignor should be a party defendant.

signment to him from the plaintiff, he is not liable to be sued on it, although it would be otherwise after payment of the debt secured.⁷⁸³

In some states an indorser or surety cannot be sued until proper diligence has been used to collect from the maker or principal debtor.⁷⁸⁴ And, if a note can be collected from the maker, the assignor cannot be sued on his covenant.⁷⁸⁵ In Kentucky the assignee must first proceed against the maker, without unreasonable delay, to a return of execution unsatisfied, the question of diligence being one for the court to determine.⁷⁸⁶ But in Illinois the indorser may be sued at once, if the maker has been adjudged a bankrupt.⁷⁸⁷

Action against Drawer.

§ 1663. The holder of a bill may bring suit against the acceptor and drawer, or either of them, and he may sue the acceptor for the use of the drawer.⁷⁸⁸ So, he may prove the full amount of the bill in bankruptcy against both acceptor and drawer, deducting dividends already received before proof and accounting for any excess in final dividends.⁷⁸⁹ The words "value received" in a bill of exchange indicate, in general, the consideration received by the drawee, but on proof of its being received by the drawer the holder may recover against him on the common counts.⁷⁹⁰

Where the bill is paid by an accommodation acceptor, he may have his action against all the drawers, including a third party who has indorsed the bill for that purpose at the time it was drawn.⁷⁹¹ But the acceptor cannot bring suit against the drawer until he has himself paid the bill.⁷⁹²

⁷⁸³ *Smith v. Felton*, 85 Ind. 223.

⁷⁸⁴ See § 762 et seq., *supra*. So, *Lee v. Love*, 1 Call (Va.) 497.

⁷⁸⁵ *Swall v. Clarke*, 51 Cal. 227.

⁷⁸⁶ *Francis v. Gant*, 80 Ky. 190. But it is not necessary to prove that a judgment in personam was rendered against a maker who was a married woman. *Green v. Page*, Id. 368.

⁷⁸⁷ *National Bank of Commerce v. Booth*, 5 Biss. 129, Fed. Cas. No. 10,036.

⁷⁸⁸ *Davis v. Baker*, 71 Ga. 33.

⁷⁸⁹ *Ex parte Wildman*, 1 Atk. 109.

⁷⁹⁰ *Higmore v. Primrose*, 5 Maule & S. 65; *Pleiss v. Maule*, 2 Miles (Pa.) 186.

⁷⁹¹ *Church v. Swope*, 38 Ohio St. 493.

⁷⁹² *Parker v. U. S.*, 1 Pet. C. C. 262, Fed. Cas. No. 10,750.

Action against Acceptor—Drawee.

§ 1664. The drawer may bring suit against the acceptor on his refusal to pay an accepted bill, but in case of nonacceptance he can only sue the drawee upon his agreement to accept.⁷⁹³ If the drawee admits that he owes the drawer of a check, and promises that it shall be honored, he will be liable on such promise to the holder, even though the check was postdated and void.⁷⁹⁴ So, if he promises to pay the bill when in funds, and the holder retains it for that purpose, the drawee will be liable, when in funds, for money received to the holder's use.⁷⁹⁵ And if the bill is payable out of a particular fund, and the acceptor receives the fund and applies it to other drafts, he will be liable to the holder of the bill.⁷⁹⁶ But the mere mention of a particular fund in a draft, as means of reimbursement, will give the payee no right of action against the drawee prior to acceptance.⁷⁹⁷ And, where a draft is not yet accepted, the fund in the drawee's hands will remain liable to an attachment against the drawer.⁷⁹⁸ A check, like a bill of exchange, gives the holder no

⁷⁹³ 2 Daniel, Neg. Inst. 238. And see § 589, *supra*. And substantial damages may be recovered, *Rollin v. Steward*, 14 C. B. 595; but not on the ground of slander for saying the drawer's account was overdrawn, *Etting v. Bank*, 7 Rob. (La.) 459.

⁷⁹⁴ *Ardern v. Rowney*, 5 Esp. 254. So, where the drawee has funds of the drawer, and verbally promises to pay the check, he may be sued by the indorsee. *Leach v. Hill* (Iowa) 76 N. W. 687. And see §§ 589, 643, *supra*.

⁷⁹⁵ *Chit. Bills*, 360; *Stevens v. Hill*, 5 Esp. 247; *Kilsby v. Williams*, 5 Barn. & Ald. 816, 1 Dowl. & R. 476. And such draft and promise to pay amount to an equitable assignment of the fund. *Ex parte Alderson*, 1 Madd. 53, 2 Rose, 447. But an action against the drawee is not supported by his promise to the plaintiff, without consideration, to pay the draft, although the drawee was indebted to the drawer, and the drawer had credited the draft to him without charging it to the payee or releasing him. *Fairchild v. Feltman*, 32 Hun, 398.

⁷⁹⁶ *Grammer v. Carroll*, 4 Cranch, C. C. 400, Fed. Cas. No. 5,681.

⁷⁹⁷ *Brill v. Tuttle*, 81 N. Y. 454.

⁷⁹⁸ *De Liquero v. Munson*, 11 Helsk. (Tenn.) 15; *Cushman v. Haynes*, 20 Pkk. (Mass.) 132; *Sands v. Matthews*, 27 Ala. 399. But see, *contra*, *Miller v. Hubbard*, 4 Cranch, C. C. 451, Fed. Cas. No. 9,574; although the drawee had no notice until after the attachment, *King v. Gorsline*, Id. 150, Fed. Cas. No. 7,798.

claim on the fund in the drawee's hands until it is accepted.⁷⁹⁹ And, if it is revoked by the drawer before it is presented, the drawee will not be liable to the holder, and the check will not be entitled to any priority over other checks afterwards drawn.⁸⁰⁰ But in Illinois a bank check, drawn upon a banker having sufficient funds, is a legal transfer of the fund, and the bank is liable to an action upon the check by any holder.⁸⁰¹ But this is not so if there are not sufficient funds to meet it.⁸⁰²

Parties Jointly Liable.

§ 1665. Parties who are jointly liable on a bill or note must, in general, be jointly sued. But a statute providing that defendants who are not to be found in the district need not be joined is applicable to joint notes.⁸⁰³ Successive indorsers cannot, however, be held as joint makers.⁸⁰⁴ And a joint action has been held not to lie against three makers of a note, some of whom signed with a seal (making it their bond), and some without.⁸⁰⁵ But one who signs a note as maker may be sued with his co-makers, although he adds the word "security" to his signature.⁸⁰⁶ But if he adds his signature, in

⁷⁹⁹ *Dickinson v. Coates*, 79 Mo. 250; *Merchants' Nat. Bank v. Coates*, Id. 168. And see §§ 599, 643, *supra*. Especially where there are not sufficient funds in the bank. *Dana v. Bank*, 13 Allen (Mass.) 445. And see §§ 599, 643, *supra*.

⁸⁰⁰ *Dykens v. Bank*, 11 Paige (N. Y.) 612. But in Wisconsin a check amounts to an equitable assignment of the fund pro tanto, and the drawer cannot stop the payment arbitrarily. *Pease v. Landauer*, 63 Wis. 20.

⁸⁰¹ *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212.

⁸⁰² *Coates v. Preston*, 105 Ill. 470.

⁸⁰³ *Burdette v. Bartlett*, 95 U. S. 637; Rev. St. U. S. § 737.

⁸⁰⁴ *Camden v. McKoy*, 4 Ill. 437. So, a wife indorsing her husband's note, expressly charging her separate estate, is not liable as a joint maker with him. *Hosford v. Hotchkiss*, 27 Fed. 285.

⁸⁰⁵ *Blery v. Haines*, 5 Whart. (Pa.) 563.

⁸⁰⁶ *Craddock v. Armor*, 10 Watts (Pa.) 258. So, where additional makers sign as sureties, after the maturity of a joint and several note, they become at once liable with the others as makers. *McVean v. Scott*, 46 Barb. (N. Y.) 379. But the payee of a joint and several note, by indorsing as "surety," cannot render the makers liable with him in a joint action. *Martin v. Fales*, 24 N. H. 242. And where the original relation of the principal and surety is reversed by subsequent agreement between themselves, the new surety

that manner, after the payee's death, he is in reality a guarantor, and not a joint maker, and should be separately sued as such, although he afterwards agreed with the payee's administrator to be liable as principal debtor.⁸⁰⁷ On the other hand, it has been held that a judgment may be entered against the principal alone on a warrant of attorney to confess a joint judgment against principal and surety.⁸⁰⁸ But one joint maker cannot be held severally upon a mere offer, after the insolvency of his co-maker, and on application for a joint and several note, to remit the amount in a few days.⁸⁰⁹

§ 1666. Judgment rendered against one joint maker of a note is a bar to further action against the other.⁸¹⁰ But, where several notes are given in settlement of one original cause of action, they may be sued separately, and payment of one judgment will not release the others.⁸¹¹ A judgment in attachment, like a personal judgment, cannot be rendered against one of two joint makers.⁸¹² But a joint maker sued alone can only object to the nonjoinder of the others by plea in abatement,⁸¹³ or, if the defect appear on the face of the declaration, by demurrer.⁸¹⁴

If one of several joint acceptors is an infant, he may be omitted, and the others declared against as accepting the bill in the joint name.⁸¹⁵ And, if all the parties jointly liable are sued, the failure to serve any of them cannot be availed of as matter of abatement.⁸¹⁶ In Georgia a joint debtor, who is sued, but not served, in the first

may have the execution directed primarily against his principal. *McTaggart v. Dolan*, 86 Ind. 314.

⁸⁰⁷ *Ives v. McHard*, 2 Ill. App. 170.

⁸⁰⁸ *Huntington v. Finch*, 3 Ohio St. 445.

⁸⁰⁹ *Jones v. Beach*, 2 De Gex, M. & G. 886.

⁸¹⁰ *Holman v. Langtree*, 40 Ind. 349; *Mitchell v. Brewster*, 28 Ill. 163; except where the other is not a resident of the state, and could not, therefore, be joined in the suit, *Cox v. Maddux*, 72 Ind. 206.

⁸¹¹ *Nathans v. Hope*, 77 N. Y. 420.

⁸¹² *Bright v. Hand*, 16 N. J. Law, 273.

⁸¹³ *Wilson v. Reddall*, Gow, 161; *Hyde v. Lawrence*, 49 Vt. 361. And a verdict for the plaintiff on such plea filed by A. and B. is conclusive in a subsequent creditors' bill by plaintiff, as against a similar plea filed by A. alone. *Dows v. McMichael*, 6 Paige (N. Y.) 139.

⁸¹⁴ *Straus v. Bank*, 36 Hun, 451.

⁸¹⁵ *Burgess v. Merrill*, 4 Taunt. 468.

⁸¹⁶ *Boots v. Boots*, 84 Ind. 171.

action, is liable to a further suit.⁸¹⁷ And in some states joint makers are made liable severally by statute, and may be sued as such separately.⁸¹⁸

Action against Joint and Several Parties.

§ 1667. Where a note is joint and several, the holder may bring separate actions against the several makers without proving a joint liability,⁸¹⁹ and may sue the different makers at the same time, and recover costs and damages separately against each.⁸²⁰ And this is true where some of the makers sign as principals, and others as sureties.⁸²¹ But he must proceed against all jointly on their joint contract, or against the several makers separately.⁸²² In Iowa, when two joint and several makers are sued together, and verdict had against both on their making a common defense, a new trial may be granted as to one and not as to the other.⁸²³ But in Texas suit cannot be dismissed as to a joint and several principal for want of service, and judgment taken against the surety.⁸²⁴ The equities between principal and surety are, however, in general, cognizable only in a court of equity.⁸²⁵ But an injunction will not be granted to stay judgment against a surety for the protection of the principal, although the principal had a defense which was available against the holder, but could not be set up against the surety.⁸²⁶

⁸¹⁷ *Ells v. Bone*, 71 Ga. 466. But see *Graham v. Marks*, 95 Ga. 33, 21 S. E. 986; *Davison v. Harmon*, 65 Minn. 402, 67 N. W. 1015.

⁸¹⁸ *Smith v. Clapp*, 15 Pet. 125. So, in *MISSISSIPPI* (Ann. Code, § 2353) and *COLORADO* (*Mattison v. Childs*, 5 Colo. 78).

⁸¹⁹ *Gray v. Palmers*, 1 Esp. 135.

⁸²⁰ *Simonds v. Center*, 6 Mass. 18. And he may sue a several maker separately, even though the note is not expressly joint and several. *Hollis v. Vandergrift*, 5 Houst. (Del.) 521.

⁸²¹ *First Nat. Bank of Biddeford v. McKenney*, 67 Me. 272.

⁸²² *Ritchie v. Gibbs*, 7 Ill. App. 149. In *VERMONT* those makers who reside in the state may be sued jointly, whether the note is joint, or joint and several. V. S. § 1174.

⁸²³ *Gordon v. Pitt*, 3 Iowa, 385.

⁸²⁴ *Crawford v. Jones*, 24 Tex. 382; without showing that the principal is nonresident or insolvent, *Burden v. Cross*, 33 Tex. 685.

⁸²⁵ *Heath v. Bank*, 44 N. H. 174.

⁸²⁶ *White v. Schurer*, 4 Baxt. (Tenn.) 23.

Action against Surviving Joint Debtor.

§ 1668. Where a joint debtor dies, an action at law will lie only against the survivor; but such action will be no bar to subsequent proceedings in equity, if necessary, against the estate of the deceased.⁸²⁷ And, where one maker of a joint note has died, the payee is not obliged to proceed against his representatives, and, if they appear voluntarily in the suit, it will be a waiver of citation.⁸²⁸ If, however, a surety and the administrator of the deceased principal maker are irregularly joined in the judgment, the judgment against the surety will not be rendered void thereby.⁸²⁹ And where one joint maker dies *pendente lite*, and his administrator is substituted by order of the court, leave to bring a separate action against his estate will be implied.⁸³⁰ In some states, however, it is provided that, on the death of any joint debtor, his representatives shall remain liable upon the contract, as though it were a several obligation as well as joint.⁸³¹ And in Indiana the personal representative of a deceased joint maker may be sued with the survivor, the common-law rule not having obtained there.⁸³²

⁸²⁷ *Moore v. Rogers*, 19 Ill. 347; *Maples v. Geller*, 1 Nev. 233; *Mattison v. Childs*, 5 Colo. 78.

⁸²⁸ *Womack v. Shelton*, 31 Tex. 592.

⁸²⁹ *Boyd v. Titzer*, 6 Cold. (Tenn.) 568.

⁸³⁰ *McVean v. Scott*, 46 Barb. (N. Y.) 379.

⁸³¹ KENTUCKY (Ky. St. § 476); MARYLAND (Pub. Gen. Laws, art. 50, § 1); MISSISSIPPI (Ann. Code, § 2353); NEW JERSEY (2 Gen. St. p. 2336, § 3); VERMONT (V. S. § 1176); VIRGINIA (Code, § 2855); WEST VIRGINIA (Code, c. 99, § 13). The NEW JERSEY act has been held to apply to notes and other simple contracts, although it was once thought to be restricted to obligations under seal. *Thompson v. Johnson*, 40 N. J. Law, 220.

⁸³² *Hudelson v. Armstrong*, 70 Ind. 99; inasmuch as such liability was created by act of 1817 (Rev. St. p. 593), and not affected by the act of 1818 giving force in INDIANA (Horner's Rev. St. § 236) to the common law of England. So, too, *Redman v. Marvil*, 73 Ind. 593; *McCoy v. Payne*, 68 Ind. 327. And in a declaration against such parties it is sufficient to aver the note to have been made by "the defendants." *Kelso v. Wolf*, 70 Ind. 105.

Joint Action against Several Parties.

§ 1669. By statute in Great Britain since 1855 all parties to a bill or note may be joined as defendants in one suit.⁸³³ And a similar provision now exists in many of the United States,⁸³⁴ guarantors⁸³⁵ and sureties being expressly included in some of the states.⁸³⁶ In Georgia it has been held that the charter of a particular bank authorizing such suits upon paper held by the bank is a constitutional act.⁸³⁷ In Virginia a special exception is made as to nonnegotiable instruments, providing that only joint assignors shall be joined as defendants.⁸³⁸ And in Mississippi no action can be brought against parties secondarily liable on a note without

⁸³³ 18 & 19 Vict. c. 67. And checks are within the operation of the act. *Eyre v. Waller*, 5 Hurl. & N. 460; *Keene v. Beard*, 8 Wkly. Rep. 469.

⁸³⁴ ARKANSAS (Sand. & H. Dig. § 502); CALIFORNIA (Code Civ. Proc. § 383); DISTRICT OF COLUMBIA (Rev. St. § 887); GEORGIA (Civ. Code, § 3691); INDIANA (Rev. St. §§ 270, 5516); ILLINOIS (Laws 1895, p. 262, § 2); MASSACHUSETTS (Pub. St. c. 167, § 4); MISSISSIPPI (Ann. Code, § 2353); MISSOURI (Rev. St. § 1995); NEBRASKA (Comp. St. § 3385); NEW JERSEY (2 Gen. St. p. 2537, § 29); NEW YORK (Code Civ. Proc. § 454); NORTH CAROLINA (Code, § 186); OHIO (Rev. St. § 5009); OREGON (Code Civ. Proc. § 36); RHODE ISLAND (Gen. Laws, c. 166, § 2; *Id.* c. 233, § 21, as to foreign bills); SOUTH CAROLINA (Code Civ. Proc. § 141); TENNESSEE (Shannon's Code, §§ 3511, 4484); VIRGINIA (Code, § 2853); WEST VIRGINIA (Code, c. 99, § 11); WISCONSIN (Sanb. & B. Ann. St. § 2609, including different instruments for the same debt). In MISSISSIPPI the holder cannot sue a party secondarily liable without joining all who are primarily liable. Ann. Code, § 3516.

⁸³⁵ KANSAS (Gen. St. c. 115, § 18); MICHIGAN (How. Ann. St. § 7345; *Phelps v. Church*, 65 Mich. 231, 32 N. W. 30). So, in MINNESOTA (*Hammel v. Beardsley*, 31 Minn. 314, 17 N. W. 858); NEBRASKA (*Weitz v. Wolfe*, 28 Neb. 500, 44 N. W. 485). So, in TEXAS (Rev. St. art. 312), as to non-negotiable instruments also. But not guarantors in CONNECTICUT (*Lemon v. Strong*, 55 Conn. 443, 13 Atl. 140); nor as to nonnegotiable notes in WEST VIRGINIA (*Bank of Huntington v. Hysell*, 22 W. Va. 142).

⁸³⁶ CALIFORNIA (Code Civ. Proc. § 383); COLORADO (Mills' Ann. Code, § 13); IOWA (Code, § 3465); NEVADA (Gen. St. § 3037).

⁸³⁷ *Davis v. Bank*, 31 Ga. 69.

⁸³⁸ VIRGINIA (Code, § 2861); WEST VIRGINIA (Code, c. 99, § 15).

joining all prior parties living in the state,⁸³⁹ and the statute formerly required that all parties be sued together.⁸⁴⁰

Under the statutes above referred to, the maker and indorsers of a negotiable note may, in general, now be sued together in one action.⁸⁴¹ But without such a statute successive indorsers could not be joined as defendants in the same action.⁸⁴² And this is still the case where the action is brought by the indorser for money paid, and not on the note.⁸⁴³

In states where the holder is required to use diligence against the maker in order to hold the indorser, he must still prove, in a joint action against the indorsers, that he has used such diligence.⁸⁴⁴ And he cannot, therefore, sue the maker and indorser in the same action, unless peculiar circumstances render the indorser immedi-

⁸³⁹ MISSISSIPPI (Ann. Code, § 3516). And the party primarily liable cannot raise the objection that secondary parties are not joined. *Hamilton v. Catchings*, 58 Miss. 92.

⁸⁴⁰ Code, § 2237; *Stiles v. Inman*, 55 Miss. 469. But this did not require a joint action against drawer and acceptor, *McGrath v. Hoopes*, 26 Miss. 496; or against joint makers of a note residing in different counties, *Moore v. Knox*, 46 Miss. 602.

⁸⁴¹ *Overshiner v. Martin*, 87 Ind. 189; *Holland v. Hunton*, 15 Mo. 475; *Kautzman v. Weirick*, 26 Ohio St. 330; *Williams v. Jones*, 79 Ala. 119; *Hofecker v. Moon*, 21 D. C. 263; *Phelps v. Church*, 65 Mich. 231, 32 N. W. 30; *Main v. Johnson*, 7 Wash. 321, 35 Pac. 67. And this is true in TEXAS, although an indorser is discharged if suit is not brought at the first term. *Brooks v. Breeding*, 32 Tex. 752. So, one who indorses specially a note payable to bearer may be sued with the maker, *Stout v. Noteman*, 30 Iowa, 414; or who indorses with an express guaranty, *Green v. Burrows*, 47 Mich. 70, 10 N. W. 111. And see § 739, *supra*. But the statute makes no change in the liability of the parties. *Willis v. Willis*, 42 W. Va. 522, 36 S. E. 515.

⁸⁴² *Brown v. Knower*, 2 Ill. 469; *Wolf v. Hostetter*, 182 Pa. St. 202, 37 Atl. 968; *Rhine v. Hart*, 27 Tex. 94. But such action now lies in TEXAS. *Jones v. Ritter*, 32 Tex. 717. So, a joint action would not lie against maker and indorser. *Webster v. Barnett*, 17 Fla. 272. And in NEW JERSEY the statute providing for such action did not embrace suits before a justice of the peace. *Craft v. Smith*, 35 N. J. Law, 302. But this is now expressly provided for. Revision, p. 134.

⁸⁴³ *Barker v. Cassidy*, 16 Barb. (N. Y.) 177.

⁸⁴⁴ *Marshall v. Pyeatt*, 13 Ind. 255.

ately liable.⁸⁴⁵ So, if one indorses "to be liable in the second instance," he cannot be sued jointly with the maker.⁸⁴⁶

§ 1670. — Where an action is brought under the statute against the maker and indorser, it may be discontinued on payment of costs as to one defendant, and proceed as to the other.⁸⁴⁷ And separate judgments may be rendered against the several defendants on separate defenses made by them.⁸⁴⁸ Under the earlier Tennessee statute the action must be a joint one, and it could not be dismissed as to one and continued against the other.⁸⁴⁹ And in Mississippi the action cannot be dismissed against the maker and proceed against the indorser.⁸⁵⁰ In Michigan a judgment cannot be entered generally in an action against several parties to a note, where the return does not show distinctly what defendants were served.⁸⁵¹ But if a stranger, indorsing in blank before the payee, is sued with the maker, protest and notice of dishonor need not be averred as against him.⁸⁵² In Texas, where the maker dies pending a suit against maker and indorser, judgment may be entered against the latter without joining the representatives of the maker,⁸⁵³ although the holder cannot, in that state, discontinue his suit against the principal debtor, and take judgment against the indorser or surety, unless the principal is a nonresident or is insolvent.⁸⁵⁴

Where action at law is brought jointly against maker and indorser, the indorsers are not necessary parties to a bill in equity afterwards filed to subject the property of the principal debtor to an execu-

⁸⁴⁵ *Mix v. Bank*, Id. 521.

⁸⁴⁶ *Bartlett v. Byers*, 35 Ga. 142.

⁸⁴⁷ *Fuller v. Van Schaleck*, 18 Wend. (N. Y.) 547.

⁸⁴⁸ *Boyd v. Beaudin*, 54 Wis. 193, 11 N. W. 521; *Nevill v. Hancock*, 15 Ark. 511. But a joint judgment against maker and indorser is satisfied by a payment by the latter, and cannot support an execution afterwards against the maker. *Potvin v. Meyers*, 27 Neb. 749, 44 N. W. 25.

⁸⁴⁹ *Holland v. Harris*, 2 Sneed, 68.

⁸⁵⁰ *Smith v. Crutcher*, 27 Miss. 455.

⁸⁵¹ *Sherman v. Palmer*, 37 Mich. 509.

⁸⁵² *Hardy v. White*, 60 Ga. 454.

⁸⁵³ *Aldridge v. Mardoff*, 32 Tex. 204.

⁸⁵⁴ *Barnett v. Tayler*, 30 Tex. 453. But he may discontinue against drawer and indorser, and take judgment against the acceptor. *Young v. Davidson*, 31 Tex. 153.

tion.⁸⁵⁵ And no costs can be recovered against the indorser in a bill in equity filed for a discovery against both maker and indorser after recovery of separate judgments at law against them, if the complainant knew, or had reason to know, that the maker was solvent.⁸⁵⁶

But under many of the statutes providing for joint action, and not expressly including guarantors, such an action will not lie against maker, indorser, and guarantor,⁸⁵⁷ or against maker and guarantor only,⁸⁵⁸ although under other statutes it has been held that the guarantor may be sued jointly with the maker.⁸⁵⁹

Plaintiff and Defendant Identified.

§ 1671. Where the maker of a note is appointed administrator of the payee, an action will lie against him in favor of a subsequent holder, since the title to the note and the liability upon it are no longer in the same person.⁸⁶⁰ But, where the payee appoints the maker his executor, it has been held that the note is satisfied, and the executor cannot transfer it, so as to enable his indorsee to

⁸⁵⁵ First Nat. Bank of St. Johns v. Tyler, 55 Mich. 297, 21 N. W. 353.

⁸⁵⁶ Austin v. Figuera, 7 Paige (N. Y.) 56.

⁸⁵⁷ Miller v. Gaston, 2 Hill (N. Y.) 188. But the rule is otherwise in TEXAS. Tooke v. Taylor, 31 Tex. 1. And as to an irregular indorser before delivery, see § 848, supra; Cawley v. Costello, 15 Hun (N. Y.) 303; Wade v. Creighton, 25 Or. 455, 36 Pac. 289.

⁸⁵⁸ Allen v. Fosgate, 11 How. Prac. (N. Y.) 218; Mowery v. Mast, 9 Neb. 445, 4 N. W. 69; Graham v. Ringo, 67 Mo. 324; especially where the guaranty is by a separate instrument, Barton v. Spels, 5 Hun (N. Y.) 60. And the action will lie against the maker after dismissal as to the guarantor. Phelps v. Church, 65 Mich. 231, 32 N. W. 30.

⁸⁵⁹ Hendrix v. Fuller, 7 Kan. 331; Whittenhall v. Korber, 12 Kan. 618; Gagan v. Stevens, 4 Utah, 348, 9 Pac. 706; Hammel v. Beardsley, 31 Minn. 314, 17 N. W. 858.

⁸⁶⁰ Byles, Bills, 57; Chit. Bills, 610; Nedham's Case, 8 Coke, 135. But the maker, after being appointed administrator of the payee, and having inventoried the note as a debt due from him to the estate, cannot be sued on the note by an administrator of the payee appointed in another state. Stevens v. Gaylord, 11 Mass. 255. And where the note was delivered by the deceased to A. without indorsement, and the maker afterwards became the payee's administrator, equity will compel an indorsement by him as administrator, and payment by him as maker. Hodge v. Cole, 140 Mass. 116, 2 N. E. 774.

bring suit upon it against him as maker.⁸⁶¹ So, where the payee is one of the makers, he cannot sue the other makers, as he is jointly liable with them.⁸⁶² And if a note is made by A. to his firm, A., B. & C., and they indorse it to C., D., and E., the indorsees cannot sue B. as indorser, since one of their number, C., is jointly liable with him.⁸⁶³ For the same reason, where a bill is drawn by a partner upon his firm, and accepted by them as a firm, he cannot afterwards bring suit against them as acceptors.⁸⁶⁴ But the payee of a note may sue the makers, although they have an interest in common as members of the same company.⁸⁶⁵ So, on a joint and several note by A. and B. to B. and C., the payees may sue A. on his several liability.⁸⁶⁶

Where one who has become liable on a bill or note afterwards regains possession of it, he cannot bring suit against intervening parties, to whom he would be liable again on his earlier undertaking.⁸⁶⁷ So, where the purchaser under a second indorsement is liable upon the first indorsement as a partner, he cannot sue the second indorser.⁸⁶⁸ But if the holder is not liable to the second indorsers, although he has previously indorsed the paper himself, he may bring suit against them.⁸⁶⁹ Thus, if a note payable to the firm of A. & B. is indorsed on their dissolution to B., as part of his share of the assets, and is afterwards indorsed by him to C., and by

⁸⁶¹ Chit. Bills, 610; *Freakley v. Fox*, 9 Barn. & C. 130, 4 Man. & R. 18.

⁸⁶² Byles, Bills, 42; *Moffat v. Van Millengen*, 2 Bos. & P. 124, note; *Moore v. Denslow*, 14 Conn. 235. But in KENTUCKY such note has been held to be that of the other makers only, and may be so sued, *Morrison v. Stockwell's Adm'rs*, 9 Dana (Ky.) 172; especially where the plaintiff signed it with his co-maker as executors of another person, *Allin v. Shadburne*, 1 Dana (Ky.) 68.

⁸⁶³ *Mainwaring v. Newman*, 2 Bos. & P. 120.

⁸⁶⁴ *Neale v. Turton*, 4 Bing. 149, 12 Moore, 365.

⁸⁶⁵ *Van Ness v. Forrest*, 8 Cranch, 30.

⁸⁶⁶ *Beecham v. Smith*, El., Bl. & El. 442. But see, contra, in the case of a joint and several note under seal, *Glenn v. Sims*, 1 Rich. Law (S. C.) 34.

⁸⁶⁷ Byles, Bills, 157; Chit. Bills, 607; 2 Daniel, Neg. Inst. 237; *Bishop v. Hayward*, 4 Term R. 470; *Britten v. Webb*, 2 Barn. & C. 483, 3 Dowl. & R. 650.

⁸⁶⁸ *Decreet v. Burt*, 7 Cush. (Mass.) 551.

⁸⁶⁹ Byles, Bills, 158; 2 Daniel, Neg. Inst. 237; *Wilders v. Stevens*, 15 Mees. & W. 208; *Williams v. Clarke*, 16 Mees. & W. 834; *Morris v. Walker*, 15 Q. B. 589.

C. back to A., for the purchase of A.'s interest in the firm, A. may bring suit against B. as indorser, although apparently liable with B. on the prior firm indorsement.⁸⁷⁰

Action against Stranger.

§ 1672. In general, only those named in the instrument as parties are liable to be sued upon it. But, where a third party makes a valid promise to pay a bill, he may afterwards be sued on such promise by a subsequent party who takes up the bill at its maturity.⁸⁷¹ But no liability, implied from funds in hand, will generally be sufficient without an express promise on the defendant's part.⁸⁷² Thus, where a party receives money for the purpose of taking up a bill, and offers to do so, shortly after its maturity, and after it had been already returned by the holder to his indorser, the holder cannot regain possession of the bill, and look to such party for its payment.⁸⁷³ And where one guaranties a bill to the acceptor, and the acceptor, drawer, and guarantor all become bankrupt, a later holder, who has discounted the bill, on being informed of the guaranty, but without notice either to the acceptor or the guarantor, cannot prove his claim as a creditor against the guarantor's estate.⁸⁷⁴ So, one who guaranties a note upon a separate paper cannot be sued by the subsequent holder of the note.⁸⁷⁵ In like manner, parties through whose hands a note has passed by mere delivery need not be made defendants in an action upon the note.⁸⁷⁶

But one who obtains the credit, although a mere agent for another, is liable according to the form of his undertaking.⁸⁷⁷ And where the agent makes the note in his own name, without disclosing his

⁸⁷⁰ Hubbard v. Matthews, 54 N. Y. 43.

⁸⁷¹ Chit. Bills, 569; Potter v. Rayworth, 13 East, 417; Barlow v. Myers, 64 N. Y. 41.

⁸⁷² Wedlake v. Hurley, 1 Crompt. & J. 83; Williams v. Everett, 14 East, 582; Grant v. Austen, 3 Price, 58. See, too, Brind v. Hampshire, 1 Mees. & W. 365.

⁸⁷³ Chit. Bills, 361; Stewart v. Fry, 1 Moore, 74, 7 Taunt. 339.

⁸⁷⁴ Ex parte Stephens, 3 Ch. App. 753.

⁸⁷⁵ McLaren v. Watson, 26 Wend. (N. Y.) 425.

⁸⁷⁶ Riley v. Schawacker, 50 Ind. 592.

⁸⁷⁷ Orr v. Union Bank, 1 Macq. 513.

principal, he alone is liable on it.⁸⁷⁸ And an action will not lie against one as maker who does not appear as such on the face of the paper, without proof that he was actually such, and used or recognized the name signed as his.⁸⁷⁹ But an acknowledgment that he was responsible for the note, although the purchaser takes it on the faith of such acknowledgment, is not an acknowledgment of the signature or the note as his.⁸⁸⁰ So, the widow and heirs of B. will not be liable on a note signed by "A., Attorney of Estate of B."⁸⁸¹ But where money is loaned to an agent for the business of a firm, and is so used, and a bill is drawn by the agent in the name of one partner, the firm may be liable on the money counts, although not liable on the bill.⁸⁸² If, however, goods are sold to a corporation, and the note of an agent taken in payment, and judgment is recovered on it against the agent, it will be a bar to further suit against the corporation.⁸⁸³ So, too, if the agent has charged the amount to his principal, and the note has been proved by the holder against the insolvent agent, and a dividend received on it from his estate.⁸⁸⁴

⁸⁷⁸ *Cragin v. Lovell*, 109 U. S. 194, 3 Sup. Ct. 132. Thus, the president of a corporation has been held individually liable on a note signed by him in the corporate name, with his own name added below with the suffix "Pres.," *Heffner v. Brownell* (Iowa) 31 N. W. 947; while the corporation has been held on a note signed by the president and secretary in their official names, *Farmers' & Mechanics' Bank v. Colby*, 64 Cal. 352, 28 Pac. 118. So, A., B., and C. are liable as acceptors on a bill drawn upon them, and accepted by A. in his own name, by authority of B. and C. *Jenkins v. Morris*, 16 Mees. & W. 877. For a full discussion of the liability of principal or agent, respectively, as determined by the manner of execution, see § 131 et seq. *supra*.

⁸⁷⁹ *Keck v. Brewing Co.*, 22 Mo. App. 187.

⁸⁸⁰ *Bolles v. Walton*, 2 E. D. Smith (N. Y.) 164.

⁸⁸¹ *Merchants' Bank v. Hayes*, 7 Hun (N. Y.) 530.

⁸⁸² *Allen v. Colt*, 6 Hill (N. Y.) 318.

⁸⁸³ *Bradlee v. Glass Manufactory*, 16 Pick. (Mass.) 347. But see, where the note was signed "A. B., treasurer of the H. G. Co.," *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11, and 7 East. Rep. 258.

⁸⁸⁴ *Bedford Commercial Ins. Co. v. Covell*, 8 Mete. (Mass.) 442.

CHAPTER XLIII.

ACTION.

- I. FORM OF REMEDY.
 - II. ACTION ON LOST BILLS.
 - III. INTEREST, EXCHANGE, AND DAMAGES.
-

I. FORM OF REMEDY.

- § 1673. Forms of Action—Summary Proceedings.
- 1674. Action of "Debt."
- 1675. Collateral—Parties Entitled.
- 1676. — Sale of.
- 1677. — Action of.
- 1678. — Diligence.
- 1679. Trover—Parties to.
- 1680. — Against Agent—Wrongful Taker.
- 1681. — Against Indorsee.
- 1682. — For Lost Bills.
- 1683. — Against Bona Fide Holder.
- 1684. — Damages.
- 1685. Equity—General Principles.
- 1686. — Reform and Cancellation of Bills.
- 1687. — Injunction against Issue or Transfer.
- 1688. — Injunction against Suit.
- 1690. — Bill for Discovery.

Forms of Action—Summary Proceedings.

§ 1673. The forms of action vary materially in the different states, and are regulated by the local practice. When a bill is dishonored, the owner may ordinarily bring his suit either on the bill itself or on the original consideration, or both counts may be joined in one action.¹ In general, it is advisable that the suit be brought on the bill, since the plaintiff must otherwise not only prove the considera-

¹ Byles, Bills, 420; 2 Edw. Bills & N. § 933; 2 Pars. Notes & B. 436. But in the latter case there must be a privity of contract between the parties. 2 Edw. Bills & N. § 934.

tion, but disprove the payment of the bill given for it.² Where the surrender of a note has been procured by the maker's fraud, the holder may sue upon the tort, or waive the tort and sue for money had and received.³ If several actions are brought by one holder of different notes, which have all matured before suit brought, they will not be consolidated under the old practice at common law, and in the absence of any rule of court to that effect.⁴ But under the present English practice the plaintiff is entitled in such case to the costs in one suit only.⁵

In general, the procedure upon bills and notes is of a summary character in most foreign countries. In Great Britain summary proceedings were provided for in 1855, if brought within six months after maturity of the paper; and the holder may "at once sign final judgment," not exceeding the amount indorsed on the writ, with interest and costs, on proof of personal service, the defendant being let in to defend, within 12 days after service of the writ, on payment into court of the sum named, or affidavit of satisfactory defense, and on such terms as the court may judge fit.⁶ This act has been held to apply to checks⁷ and to demand notes (the term of six months running from the date of the note),⁸ but not to a promise to pay in installments, maturing on default of any payment, with a provision that indulgence to one party shall not prejudice proceedings against another.⁹

Action of "Debt."

§ 1674. At common law, an action of "debt" may be brought by the payee of a note against the maker,¹⁰ or by the drawer against

² Byles, Bills, 420; 2 Pars. Notes & B. 436; *Hebden v. Hartsink*, 4 Esp. 46; *Bishop v. Rowe*, 3 Maule & S. 362.

³ *Penobscot R. Co. v. Mayo*, 67 Me. 470.

⁴ *Bank of Alexandria v. Young*, 1 Cranch, C. C. 458, Fed. Cas. No. 857.

⁵ *Jackson v. Freeman*, 20 Wkly. Rep. 683.

⁶ 18 & 19 Vict. c. 67, § 1.

⁷ *Rochford v. Daniel*, 1 Fost. & F. 602; *Eyre v. Waller*, 5 Hurl. & N. 460.

⁸ *Malthy v. Murrells*, 5 Hurl. & N. 813.

⁹ *Kirkwood v. Smith* [1896] 1 Q. B. 582.

¹⁰ Byles, Bills, 88; *Chit. Bills*, 773; *Bishop v. Young*, 2 Bos. & P. 78, if expressed to be for "value received." So, without such expression. *Hatch v.*

the acceptor of a bill purporting to be for value received,¹¹ or against the drawer of such a bill by the payee,¹² or by a remote indorsee, striking out intermediate indorsements.¹³ But debt cannot be brought on a note payable in installments until the whole has become due,¹⁴ nor on a collateral undertaking to pay the debt of another person,¹⁵ nor against the acceptor of a bill in favor of the payee,¹⁶ or of an indorsee.¹⁷

The most usual remedy, however, at common law, and, indeed, the only remedy formerly available against remote parties, was by action of "assumpsit."¹⁸ This action may be brought by an indorsee against his immediate indorser.¹⁹ So, it may be brought against a corporation on a note executed for it by its agent.²⁰ And in Massachusetts assumpsit lies on a note signed with a scroll, although where it was made the scroll was a lawful seal.²¹

Traves, 11 Adol. & E. 702. And such action lies against the maker's executor. Childress v. Emory, 8 Wheat. 642.

¹¹ Chit. Bills, 774; Priddy v. Henbrey, 1 Barn. & C. 674, 3 Dowl. & R. 165. Or by the payee or indorsee of such bill. Raborg v. Peyton, 2 Wheat. 385. So, in Virginia, by the indorsee of an inland bill against the acceptor. Vowell v. Alexander, 1 Cranch, C. C. 33, Fed. Cas. No. 17,017. In Virginia and West Virginia the statute provides for an action of debt on any note or writing.—VIRGINIA (Code, § 285); whether sealed or not. WEST VIRGINIA (Code, c. 99, § 10).

¹² Chit. Bills, 774; Hodges v. Steward, Skin. 346. So, where the drawer was payee and first indorser, and the action was brought by his immediate indorsee. Stratton v. Hill, 3 Price, 253, 2 Chit. 126. And the averment of a promise by the drawer after dishonor is surplusage, in a suit by the payee of a check against the drawer. Simpkins v. Potheary, 5 Exch. 253.

¹³ Home v. Semple, 3 McLean, 150, Fed. Cas. No. 6,658.

¹⁴ Rudder v. Price, 1 H. Bl. 548.

¹⁵ Purslow v. Bailey, 2 Ld. Raym. 1040; Hodsden v. Harridge, 2 Saund. 61.

¹⁶ Chit. Bills, 774; Simmonds v. Parmlinter, 1 Wills. 185; Browne v. London, 1 Mod. 285, 1 Freem. 14.

¹⁷ Cloves v. Williams, 3 Bing. N. C. 868, 5 Scott, 68.

¹⁸ Chit. Bills, 534. But "debt" lies by an indorsee against the maker. Willmarth v. Crawford, 10 Wend. (N. Y.) 343. Or against his immediate indorser. Stratton v. Hill, 3 Price, 253. Or a remote indorser. Onondaga Co. Bank v. Bates, 3 Hill (N. Y.) 53.

¹⁹ Campbell v. Jordan, Hempst. 534, Fed. Cas. No. 2,362.

²⁰ Proctor v. Webber, 1 D. Chip. (Vt.) 371.

²¹ McClees v. Burt, 5 Metc. 198.

Collateral—Parties Entitled.

§ 1675. The indorsement of a note generally carries with it a collateral mortgage or other security without formal assignment of the collateral.²² If property is conveyed to a trustee to secure three notes, and two of them are transferred, the indorsee may foreclose the trust deed, or compel its foreclosure.²³ And, if a mortgage secures several notes, the decree may include those that have matured after suit begun, but before decree.²⁴ Where an accommodation acceptance is secured by the drawer's trust deed and by certain notes representing another debt also, the holder of the bill may resort to the trust deed, if the notes have not been transferred by him to a bona fide holder.²⁵ But where collateral is given to an indorser for his personal indemnity, it will not inure to the benefit of an accommodation acceptor,²⁶ and such collateral will not be enforced in equi-

²² *Scott v. Turner*, 15 La. Ann. 346; *Mapps v. Sharpe*, 32 Ill. 13; *Adler v. Sargent*, 109 Cal. 42, 41 Pac. 799; *Kernohan v. Manss*, 53 Ohio St. 118, 41 N. E. 258. And see §§ 731-733, *supra*. Mere delivery of the mortgage is sufficient. *Green v. Hart*, 1 Johns. (N. Y.) 580. See, too, § 1571, *supra*, as to renewal of note secured.

²³ *Sargent v. Howe*, 21 Ill. 148. But property held in trust for several notes cannot be transferred to one cestui que trust to the prejudice of the others. *Webster v. Mitchell*, 22 Fed. 860. In general, such collateral belongs to all the notes secured pro rata, irrespective of possession of the collateral. *Lewis v. Farrell*, 51 Conn. 216. Or of priority in maturity. *Jennings v. Moore*, 83 Mich. 233, 47 N. W. 127; *Shields v. Dyer*, 86 Tenn. 41, 5 S. W. 439. Or in judgment recovered. *Aaron v. Warner*, 62 Miss. 370. And see § 1506, *supra*. But he takes subject to the agreement as to priorities made before transfer to him. *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 29 S. W. 903.

²⁴ *Williams v. Creswell*, 51 Miss. 817.

²⁵ *Toulmin v. Hamilton*, 7 Ala. 362. But the indorsee is not entitled to collateral given the acceptor, as against a bona fide purchaser of the land after release by the drawer. *St. Louis Bldg. & Sav. Ass'n v. Clark*, 36 Mo. 601. In like manner, collateral given to a surety by the principal debtor may be reached by the holder, by a bill in equity. *Merchants' & Manufacturers' Nat. Bank of Middletown v. Cummings*, 79 Hun. 397, 29 N. Y. Supp. 782.

²⁶ *Cooper v. Platt*, 39 Pa. St. 528. But if the indorser of a note, who is a surety for the maker, pays the note, and afterwards surrenders collateral received by him from the principal maker for his indemnity, he will discharge pro tanto a co-maker who was also surety for the same principal. *Kirkpatrick v. Howk*, 80 Ill. 122.

ty in favor of the holder of a bill until ordinary remedies are exhausted.²⁷ Where a bill of lading is attached to a bill of exchange, the drawee is entitled to it on acceptance, and the holder cannot refuse to deliver it until payment, and protest the bill for nonacceptance on the drawee's refusal to accept without it.²⁸

In like manner, a collateral vendor's lien goes with the transfer of a note, and may be enforced by the assignee.²⁹ And in Mississippi, if a note is made for the purchase of land, an assignee of the note may sue for performance of the contract of sale.³⁰ But where a note is given for a sewing machine, the right of property being reserved in the payee until the note is paid, transfer of the note will not enable an indorsee to bring replevin for the machine on nonpayment of the note,³¹ although it may prevent the payee from bringing trover against a third party for the machine.³²

²⁷ *Ohio Life Insurance & Trust Co. v. Reeder*, 18 Ohio, 35. But where the maker becomes bankrupt, a collateral mortgage given by him to his surety will inure in equity to the payee. *Barton v. Croydon*, 63 N. H. 417. But if the maker gives a mortgage to an indorser for his indemnity, it will be discharged if the indorser is discharged by the holder's laches, and a subsequent purchaser will have no claim upon it. *Peets v. Wilson*, 19 La. 478. On the other hand, where an accommodation indorsement has been fraudulently diverted, and used as collateral by the maker, the indorser is entitled to have all payments on the principal debt credited on the collateral note. *State Sav. Bank v. Baker*, 93 Va. 510, 25 S. E. 550.

²⁸ *Ianfear v. Blossman*, 1 La. Ann. 148. And see § 1508, *supra*. If, however, the drawee refuses to accept the bill of exchange, the holder will be entitled, as against him, to the goods consigned by the negotiable bill of lading attached. *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145. And a bill of lading will inure to the holder of a bill of exchange, where it has been appropriated by the drawer and acceptor to that purpose, and both drawer and acceptor have become bankrupt, although the holder was ignorant of such appropriation. *Ex parte Dever*, 53 Law T. (N. S.) 131. And see § 1507, *supra*.

²⁹ *Sloan v. Campbell*, 71 Mo. 387. Especially, if expressly reserved in the note. *Hobson v. Edwards*, 57 Miss. 128. And see § 732, *supra*. But the contrary rule has been laid down in Tennessee. *Green v. Demoss*, 10 Humph. 371, overruling *Eskridge v. McClure*, 2 Yerg. 84. And in Alabama such lien does not pass if the note is transferred by the vendor without personal liability; and in that case a court of equity will not enforce it in favor of the assignee. *Bankhead v. Owen*, 60 Ala. 457; *Barnett v. Riser's Ex'rs*, 63 Ala. 347.

³⁰ *Boyce v. Francis*, 56 Miss. 573.

³¹ *Domestic Sewing Mach. Co. v. Arthurhultz*, 63 Ind. 322.

³² *Esty v. Graham*, 46 N. H. 169.

Sale of Collateral.

§ 1676. The power of sale by the pledgee is under well-established legal restrictions.³³ And where collateral is delivered to the payee of a note, with authority to pledge it for certain purposes, and he consents to a sale by the pledgee without notice to the maker, he will be charged with its full value as a credit on the note.³⁴

In general, the holder of collateral must collect and apply the proceeds, and cannot transfer the collateral without an express power of sale.³⁵ Any sale except by express power of sale or statutory proceeding is a conversion, and acts as a payment up to its full value.³⁶

But where a debtor receives notice that the creditor is about to sell the collateral, and apply the proceeds to the note, and makes no reply or objection, he will be deemed to have waived further notice of sale.³⁷ If the payee of a note surrenders a collateral certificate of deposit without the maker's consent, and takes a note and mortgage from the bank for it, it will be a conversion of the collateral, and render the payee liable to the maker for its face, although the bank had already suspended when the certificate was given.³⁸ But the burden of proof is on the party who alleges that the collateral has been improperly disposed of.³⁹

Collateral for a note may be applied to the judgment afterwards rendered upon it,⁴⁰ but not (as against the pledgor's assignee in

³³ And see § 801 et seq., *supra*. In California, express provision for collateral, and its sale, may be contained in a negotiable instrument. Civ. Code, § 3092.

³⁴ *Washburn v. Pond*, 2 Allen (Mass.) 474.

³⁵ *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806.

³⁶ *Richardson v. Ashby*, *supra*; *Pauly v. Wilson*, 57 Fed. 548; *Gilliam v. Davis*, 7 Wash. 332, 35 Pac. 69. So, if he surrenders the collateral. *Haas v. Bank*, 41 Neb. 755, 60 N. W. 85.

³⁷ *Downer v. Whittier*, 144 Mass. 448, 11 N. E. 585. So, as to unreasonable place of sale. *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 43 N. E. 195. So, a full and express power of sale may preclude objection as to unfavorable state of the market. *Franklin Nat. Bank v. Newcombe*, 1 App. Div. 294, 37 N. Y. Supp. 271.

³⁸ *Greenwald v. Metcalf*, 28 Iowa, 363.

³⁹ *Vose v. Yulee*, 4 Hun (N. Y.) 628.

⁴⁰ *Jenkins v. Bank*, 111 Ill. 462.

bankruptcy, who offers to give up the note originally secured) to other debts due from the pledgor to the pledgee at the maturity of the note.⁴¹ On the other hand, a purchaser under an express power to sell at maturity of the note secured cannot be required, long afterwards, to return the collaterals purchased upon an offer to pay the note.⁴²

Action on Collateral.

§ 1677. Where a note is secured by mortgage, suit may be brought on the note alone.⁴³ And the note will be subject to equities, as though it were not secured.⁴⁴ Suit may be brought on the note before foreclosing the mortgage,⁴⁵ or before applying other collateral to its payment.⁴⁶

The maker of the principal note cannot require, in general, that the collateral be first exhausted.⁴⁷ And judgment rendered on a collateral mortgage will not, in general, merge the note,⁴⁸ and the holder may sue upon the note without offering to release or return

⁴¹ *Hathaway v. Bank*, 131 Mass. 14.

⁴² *Lewis v. Mott*, 36 N. Y. 395.

⁴³ *Lichty v. McMartin*, 11 Kan. 565. If the collateral is not collected. *Brewster v. Frazier*, 32 Md. 302. But not in California, *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086; unless the security is of no value, *Bartlett v. Cottle*, 63 Cal. 366.

⁴⁴ *Sprague v. Graham*, 29 Me. 160.

⁴⁵ *Banta v. Wood*, 32 Iowa, 469. But not in Minnesota. *Johnson v. Lewis*, 13 Minn. 364 (Gil. 337).

⁴⁶ *Lormer v. Bain*, 14 Neb. 178, 15 N. W. 323. And the collateral may be applied to satisfy a judgment on the note. *Fowle v. Child*, 164 Mass. 210, 41 N. E. 291.

⁴⁷ *McKee v. Whitworth*, 15 Wash. 536, 46 Pac. 1045. But see, contra, where his signature has been obtained by fraud of the party furnishing the collateral. *Haas v. Bank*, 41 Neb. 755, 60 N. W. 85.

⁴⁸ *Willson v. Binford*, 81 Ind. 588; *Spence v. Insurance Co.*, 40 Ohio St. 517. Or bar an action brought to recover money paid to an attorney to take up the note. *Nettleton v. Beach*, 107 Mass. 499. So, judgment on a collateral note. *First Nat. Bank v. Finck (Wis.)* 76 N. W. 608. And, conversely, judgment on the principal note is no bar to a suit on the collateral. *Black v. Reno*, 59 Fed. 917; *Burnham v. Windram*, 164 Mass. 313, 41 N. E. 305; *Waldrom v. Zacharie*, 54 Tex. 503.

the collateral.⁴⁹ If one note is given as collateral for another, action may be brought at the same time on both notes.⁵⁰

It is the duty of the holder to collect the collateral when it becomes due.⁵¹ He may bring suit on it without first demanding payment of the principal debt,⁵² and before the maturity of the principal note,⁵³ or before action on such note.⁵⁴ And he will be entitled to the costs and expenses of collecting the collateral.⁵⁵

Diligence as to Collateral.

§ 1678. Where collateral is received without any special agreement, the party receiving it is liable for ordinary diligence.⁵⁶ If

⁴⁹ *Hale v. Rider*, 5 Cush. (Mass.) 231; *Trotter v. Crockett*, 2 Port. (Ala.) 401. So, where the action is by a surety against his principal. *Taylor v. Cheever*, 6 Gray (Mass.) 146.

⁵⁰ *Lazler v. Nevin*, 3 W. Va. 622; *Corn Exch. Ins. Co. v. Babcock*, 57 Barb. (N. Y.) 231; *Eastman v. Turman*, 24 Cal. 379; *Turner v. Bank* (Ky.) 39 S. W. 425.

⁵¹ *Lishy v. O'Brien*, 4 Watts (Pa.) 141.

⁵² *Palne v. Furnas*, 117 Mass. 200. And he may sue on a bottomry bond without prosecuting a worthless acceptance given for the same debt. *The Ariadne*, 1 W. Rob. Adm. 411. But a collateral note, given as indemnity against a breach of contract, cannot be sued until after the damages are fixed by a judgment on the contract. *Rumney v. Colville*, 51 Mich. 186, 16 N. W. 372. And see *Belloni v. Freeborn*, 63 N. Y. 390. But this is not true of a collateral note given to indemnify the accommodation indorser of another note against his liability. *Merchants' & Manufacturers' Nat. Bank of Middletown v. Cumings*, 149 N. Y. 360, 44 N. E. 173, affirmed in 79 Hun, 397, 29 N. Y. Supp. 782.

⁵³ *Greenway v. Grain Co.*, 29 C. C. A. 330, 85 Fed. 536; *Seeley v. Wickstrom*, 49 Neb. 730, 68 N. W. 1017.

⁵⁴ *Weihi, Probasco & Co. v. Atlanta Mfg. Co.*, 89 Ga. 297, 15 S. E. 282; *Hapgood v. Wellington*, 136 Mass. 217. Especially if it is not collectible. *Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149.

⁵⁵ *Cressman v. Whitall*, 16 Neb. 592, 21 N. W. 458; *Ludden v. Marsters*, 16 Neb. 654, 21 N. W. 442.

⁵⁶ *Roberts v. Thompson*, 14 Ohio St. 1; *Lee v. Baldwin*, 10 Ga. 208; *Trotter v. Crockett*, 2 Port. (Ala.) 401. And see § 771, *supra*. His negligence constitutes a defense, and discharges the debt pro tanto. *Rumsey v. Laidley*, 34 W. Va. 721, 12 S. E. 866; *First Nat. Bank of Ft. Dodge v. O'Connell*, 84 Iowa, 377, 51 N. W. 162. He cannot let the collateral become outlawed. *Northwestern Nat. Bank v. J. Thompson & Sons Mfg. Co.*, 17 C. C. A. 638, 71 Fed.

he neglects to collect a dividend declared by the estate of the bankrupt drawer of a collateral bill, and refuses to return the bill itself, he will be liable for the negligence.⁵⁷ So, if a note is given as collateral for interest accrued on a certain mortgage, with a condition that it shall not be collected unless the mortgaged property proves deficient, and the holder becomes administrator of the maker, it is his duty to exhaust the mortgage security first.⁵⁸

But if the payee of a note fails to sell collateral, which afterwards becomes worthless, it will not discharge the maker.⁵⁹ So, if he delays enforcing a collateral mortgage, and it depreciates in the meantime.⁶⁰ So, it is no defense in favor of a surety that the payee has not enforced a collateral lien on personal property which was not in his particular care or custody;⁶¹ or even that the surety has been injured by the foreclosure without notice to him of a small mortgage prior to the collateral mortgage, relied on by him.⁶² So, if an accommodation acceptance is given on the faith of collateral deposited with the indorsee, and still held for the acceptor's protection, it will be no defense for the acceptor that the collateral has not been collected.⁶³ And the holder of collateral is in no case bound to sue upon it, where it is certain that the suit would be ineffectual.⁶⁴ And the debtor cannot show by parol evidence that a collateral mortgage, on which nothing was realized, was worth enough at the time of the assignment, where he has waived his right by his agreement with the assignee.⁶⁵

113; *First Nat. Bank of Ft. Dodge v. O'Connell*, supra; *Semple & Birge Mfg. Co. v. Detwiler*, 30 Kan. 386, 2 Pac. 511.

⁵⁷ *Childs v. Corp.*, 1 Paine, 285, Fed. Cas. No. 2,677.

⁵⁸ *Nichols v. Smith*, 42 Barb. (N. Y.) 381.

⁵⁹ *Granite Bank v. Richardson*, 7 Metc. (Mass.) 407.

⁶⁰ *Willson v. Binford*, 81 Ind. 588.

⁶¹ *Fuller v. Tomlinson*, 58 Iowa, 111, 12 N. W. 127.

⁶² *Vance v. English*, 78 Ind. 80.

⁶³ The drawer and acceptor being both insolvent at the time of the indorsement. *Lee Bank v. Kitching*, 7 Bosw. (N. Y.) 664. And see *Fowler v. Bank*, 88 Ga. 20, 13 S. E. 831.

⁶⁴ *Smith v. Felton*, 85 Ind. 223. And the collateral need not be returned before action against the principal debtor. *Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149.

⁶⁵ *Schmied v. Frank*, 86 Ind. 250.

Trover—Between What Parties.

§ 1679. An action of trover will lie for a bill or note,⁶⁶ e. g. for a note unlawfully taken in execution.⁶⁷ But trover will not lie for a note because of illegal consideration merely.⁶⁸ The maker of a negotiable note may bring suit for its conversion against one who obtained it without legal delivery, and wrongfully negotiated it to a bona fide holder;⁶⁹ or against a wrongful holder who has collected the note by suit.⁷⁰ So, he may bring trover against the payee for a note transferred in violation of the condition of its delivery,⁷¹ or taken without permission after refusal of consideration offered,⁷² or withheld by him after it is paid.⁷³ And one of two joint makers may have trover against the other for holding the note outstanding after it has been paid;⁷⁴ and a like action may be brought by an accommodation maker against the party accommodated, who has taken up and holds the note.⁷⁵ And the payment of a judgment in trover vests the title to the note in the defendant.⁷⁶

So, trover lies for a note delivered as collateral, to be returned on certain conditions, which have been performed.⁷⁷ And the maker

⁶⁶ Byles, Bills, 412; Davis v. Funk, 39 Pa. St. 243; Thomson v. Gortner, 73 Md. 474, 21 Atl. 371. Or for a coupon bond. Merchants' & Planters' Nat. Bank v. Trustees Masonic Hall, 62 Ga. 271. And the payee's executor is prima facie entitled to recover against a holder without indorsement. Tuttle v. Becker, 47 Iowa, 486.

⁶⁷ Ingalls v. Lord, 1 Cow. (N. Y.) 240.

⁶⁸ Morrill v. Goodenow, 65 Me. 178.

⁶⁹ Decker v. Mathews, 12 N. Y. 313.

⁷⁰ Rushin v. Tharpe, 88 Ga. 779, 15 S. E. 830, although the lawful owner knew of the suit.

⁷¹ Brown v. St. Charles, 66 Mich. 71, 32 N. W. 926.

⁷² Vancleave v. Beach, 110 Ind. 269, 11 N. E. 228.

⁷³ Stone v. Clough, 41 N. H. 290; Inhabitants of Otisfield v. Mayberry, 63 Me. 197. But not where the holder claims that the note is not paid. Pierce v. Gilson, 9 Vt. 216.

⁷⁴ Spencer v. Dearth, 43 Vt. 98.

⁷⁵ Park v. McDaniels, 37 Vt. 594.

⁷⁶ Haas v. Sackett, 40 Minn. 53, 41 N. W. 237. But not the mere recovery of judgment. Union Pac. Ry. Co. v. Schiff, 78 Fed. 216. But see contra, in same case, Dietz v. Field, 10 App. Div. 425, 41 N. Y. Supp. 1087.

⁷⁷ Robbins v. Packard, 31 Vt. 570; Stone v. Clough, 41 N. H. 290. So, the bankrupt maker's assignee may have trover for a note held by the defendant

of a note may bring trover against the payee, who has fraudulently transferred the note after failure of the consideration, even though the maker had paid the indorsee and recovered possession of the note.⁷⁸ Where two holders in common indorse the note for collection, and one afterwards obtains and holds possession against the other, trover will lie.⁷⁹ So, an infant may recover in trover a note unlawfully pledged by his guardian, the pledgee having notice of the restricted character of the pledgor's title.⁸⁰

But trover will not lie in favor of the assignee of a bankrupt drawer of a check against a creditor who has received the check, and obtained payment upon it.⁸¹ The donee of a note *causa mortis* may, however, recover it in trover from the donor's executor, after he has surrendered it to him under protest.⁸² And where a note is transferred in contemplation of a proposed partnership, which is afterwards relinquished, and is recalled before completed delivery (in halves, through the mail), the maker may recover against the payee in trover on his refusal to surrender it.⁸³

Trover against Agent—Wrongful Taker.

§ 1680. Trover lies against a common carrier for the loss of a draft,⁸⁴ or against a bailee surrendering it for cancellation without authority,⁸⁵ or against the payee, intrusted with an accommodation note for a special purpose, and fraudulently diverting it;⁸⁶ or in trust to indemnify a third party against his suretyship on the maker's bond, after tender of the canceled bond to the defendant. *Alsager v. Close*, 10 Mees. & W. 576.

⁷⁸ *Buck v. Kent*, 3 Vt. 99.

⁷⁹ *Lawatsch v. Cooney*, 86 Hun, 546, 33 N. Y. Supp. 775.

⁸⁰ *Lee v. Boyd*, 86 Ala. 283, 5 South. 489.

⁸¹ *Mathew v. Sherwell*, 2 Taunt. 439. Such check or bill not amounting to a conversion until demand and refusal to refund are proved. *Jones v. Fort*, 9 Barn. & C. 764.

⁸² *Smith v. Maine*, 25 Barb. (N. Y.) 33.

⁸³ *Smith v. Mundy*, 3 El. & El. 22.

⁸⁴ *Zeigler v. Wells*, 23 Cal. 179.

⁸⁵ *Hicks v. Lyle*, 46 Mich. 488, 9 N. W. 529.

⁸⁶ *Hynes v. Patterson*, 95 N. Y. 1. So, where the note was given to the payee for goods purchased, and he afterwards refused to deliver the goods at the price agreed, but delivered them at a greater price. *Powell v. Powell*, 71 N. Y. 71, reversing 3 Hun (N. Y.) 413.

against an agent collecting (and entitled to part of) the note, but misappropriating the entire proceeds.⁸⁷ So, against a trustee who has disposed of the paper in violation of his trust,⁸⁸ although the plaintiff had already recovered possession of the note from the indorsee.⁸⁹ So, trover will lie against an agent who receives a note to negotiate and pay the proceeds to the principal, but turns it over to another agent, by whom it is negotiated and misappropriated.⁹⁰

The pledgee of a note may have trover against any one who carries it off surreptitiously.⁹¹ And where such wrongful taker has obtained judgment on the note, the owner may sue him in trover, or in assumpsit for money had and received.⁹² If the depository of a note, although himself the maker, wrongfully withholds it from the owner, the suit should be in trover, and not in assumpsit.⁹³ And, if the maker has obtained it by fraud, the holder may bring an action of trover for it.⁹⁴

Trover against Indorsee.

§ 1681. Trover will lie in favor of the payee or acceptor against a holder, to whom the bill has been transferred by the plaintiff's agent without even apparent authority.⁹⁵ So, an accommodation acceptor may, in trover, recover an acceptance fraudulently obtained

⁸⁷ *Boyle v. Levings*, 28 Ill. 314.

⁸⁸ *Badger v. Hatch*, 71 Me. 562; *Haas v. Sackett*, 40 Minn. 53, 41 N. W. 237.

⁸⁹ *Murray v. Burling*, 10 Johns. (N. Y.) 172. Or though the maker is insolvent. *Pratt v. Boyd*, 17 Ind. 232. If the agent has collected the note, he may be sued for money had and received. *Hodges v. Lathrop*, 1 Sandf. (N. Y.) 40.

⁹⁰ *Lavery v. Snethen*, 68 N. Y. 528. But see *H. S. Benjamin Wagon & Carriage Co. v. Merchants' Exch. Bank*, 63 Wis. 470, 23 N. W. 592.

⁹¹ Though he held subject to a prior pledge, and the pledgee had recovered the amount due him. *Knight v. Legh*, 4 Bing. 589. And it is not necessary that the plaintiff should have had actual possession of the note, if he is entitled to it. *Nininger v. Banning*, 7 Minn. 274 (Gil. 210).

⁹² *Robertson v. Dunn*, 87 N. C. 191.

⁹³ *Tucker v. Jewett*, 32 Conn. 563.

⁹⁴ *Thayer v. Manley*, 73 N. Y. 305, 8 Hun (N. Y.) 551; *Boyer v. Fenn*, 18 Misc. Rep. 607, 43 N. Y. Supp. 506. But he could not bring replevin for a note obtained by duress. *Olson v. Thompson*, 6 Okl. 74, 48 Pac. 184.

⁹⁵ *Byles, Bills*, 412; *Cranch v. White*, 1 Bing. N. C. 414; *Wilcox v. Turner*, 46 Ga. 218.

by the drawer, and pledged to one having notice of the fraud.⁹⁶ So, trover lies for a bill fraudulently negotiated by an agent against one who purchased it after maturity,⁹⁷ or who obtained it under a blank indorsement, but without valuable consideration,⁹⁸ or under a restrictive indorsement "for account of" the plaintiff,⁹⁹ or as security for a usurious loan.¹⁰⁰

Trover for Lost Bills.

§ 1682. The legal owner of a lost bill may have an action of trover against the finder,¹⁰¹ or against a purchaser with notice.¹⁰² So, too, for lost bank notes,¹⁰³ or a lost check.¹⁰⁴ So, the owner and payee of a check may recover bank notes paid for it by the drawee, without proving to whom they were paid, against one who admits himself to be a finder of the notes.¹⁰⁵ In like manner, an action of trover lies, without previous demand and refusal, against one who possesses himself improperly of a bill stolen from the plaintiff,¹⁰⁶ or against one who receives payment, even in good faith, of such stolen bill, under a forged indorsement.¹⁰⁷

⁹⁶ *Smith v. De Witts*, 6 Dowl. & R. 120; *Evans v. Kymer*, 1 Barn. & Adol. 528.

⁹⁷ *Goggerley v. Cuthbert*, 2 Bos. & P. (N. S.) 170. So, for stolen United States treasury notes. *Vermilye v. Express Co.*, 21 Wall. 138. So, against a purchaser after maturity from a pledgee who transferred the bill fraudulently after payment of the debt secured. *Wood v. McKean*, 64 Iowa, 16, 19 N. W. 817. Or against the purchaser after maturity of a note which had been lost and was not indorsed. *Weathered v. Smith*, 9 Tex. 622.

⁹⁸ *Fancourt v. Bull*, 1 Bing. N. C. 681.

⁹⁹ *Treuttel v. Barandon*, 8 Taunt. 100.

¹⁰⁰ *Keutgen v. Parks*, 2 Sandf. (N. Y.) 60.

¹⁰¹ But an equitable owner could not bring trover. *Garvin v. Wiswell*, 83 Ill. 215.

¹⁰² *Lovell v. Martin*, 4 Taunt. 799.

¹⁰³ *Abrahams v. Bank*, 1 S. C. 441. So, trover lies against a corporation for bank notes detained by its agent. *Yarborough v. Bank*, 16 East, 6. And the receipt of part of the amount from the defendant is no waiver, but reduces the damages pro tanto. *Burn v. Morris*, 2 Crompt. & M. 579.

¹⁰⁴ *Down v. Halling*, 6 Dowl. & R. 455, 4 Barn. & C. 330, and 2 Car. & P. 11.

¹⁰⁵ *Greenstreet v. Carr*, 1 Camp. 551.

¹⁰⁶ *Beckwith v. Corral*, 2 Car. & P. 261.

¹⁰⁷ *Johnson v. Windle*, 3 Bing. N. C. 225; *Shaffer v. McKee*, 19 Ohio St. (2391)

Bona Fide Holder of Stolen Bill.

§ 1683. Where negotiable securities are stolen, the owner may pursue them, and the proceeds of them, until they reach the hands of a bona fide holder for value before maturity.¹⁰⁸ But trover will not lie for them against such holder,¹⁰⁹ although he may have purchased directly from the thief.¹¹⁰ But a bona fide holder, who has received them by way of collateral, will only be protected as such to the extent of the debt secured.¹¹¹ Where an agent has collected the security, and paid it over in good faith to his principal, the amount cannot be recovered from him.¹¹² The owner of stolen bank notes, in like manner, cannot recover them in trover from a bona fide purchaser.¹¹³

But, where a negotiable instrument has been fraudulently disposed of by the owner's agent, and an action is brought by the owner against the holder, proof of the fraud will throw on the holder the burden of proving his good faith.¹¹⁴ So, in an action of trover for a lost note, the burden as to good faith is thrown upon the defendant by proof of the loss,¹¹⁵ the fact of good faith being for the jury to determine.¹¹⁶

526. Although he has received the payment as collecting agent, and has paid it over in good faith to his principal. *Johnson v. Bank*, 6 Hun (N. Y.) 124.

¹⁰⁸ *Newton v. Porter*, 69 N. Y. 133; *Case v. Association*, 4 N. Y. 166.

¹⁰⁹ *Collins v. Martin*, 1 Bos. & P. 648; *Black River Ins. Co. v. New York State Loan & Trust Co.*, 73 N. Y. 282. Especially where the loss was due to the plaintiff's own neglect. *Morrison v. Buchanan*, 6 Car. & P. 18. So, where a collateral note was freely surrendered by the pledgee "to be made good" before 3 p. m., and was fraudulently returned by the pledgor to the maker, who was ignorant of the agreement. *Citizens' Nat. Bank of Baltimore v. Hooper*, 47 Md. 88.

¹¹⁰ *Jones v. Nellis*, 41 Ill. 482; *Murray v. Lardner*, 2 Wall. 110; *Dutchess Co. Mut. Ins. Co. v. Hachfield*, 73 N. Y. 226.

¹¹¹ *Baldwin v. Ely*, 9 How. 580. And see § 1731, *infra*.

¹¹² *Simpson v. Garland*, 76 Me. 203. So, an interest coupon. *Spooner v. Holmes*, 102 Mass. 503.

¹¹³ *Lowndes v. Anderson*, 13 East, 130, 1 Rose, 99; *Miller v. Race*, 1 Burrows, 452; *Snow v. Sadler*, 11 Moore, 506.

¹¹⁴ *Merchants' & Planters' Nat. Bank v. Trustees Masonic Hall*, 62 Ga. 271. And see § 1026, *supra*.

¹¹⁵ *Nicholson v. Patton*, 13 La. 213; *Matthews v. Poythress*, 4 Ga. 287.

¹¹⁶ *Solomons v. Bank*, 13 East, 135, note; *King v. Milsom*, 2 Camp. 5; (2392)

Damages in Trover.

§ 1684. The damages recoverable in an action of trover are measured by the value of the bill at the time of its conversion.¹¹⁷ The actual value is to be considered, and that is *prima facie* the amount due for principal and interest on the bill.¹¹⁸ And it has been held that interest should be reckoned up to the verdict.¹¹⁹ The face value is a general indication of the actual value, but may be modified by reason of payment on account, insolvency of the maker, or other lawful defense, diminishing the value, or affecting the validity, of the bill.¹²⁰ Its nominal value may be recovered, if shown to be available as such to the owner, although the maker may have no property within reach of execution.¹²¹ And where a bill is deposited by a bankrupt to secure another person as surety on the bankrupt's bond, and the depository refuses to surrender it to the assignee on his tender of the bond canceled, and afterwards raises upon it a sum equal to half its face, he will be liable to the assignee in trover for the whole face of the bill.¹²² But where an accommodation maker recovers in trover against the payee for a fraudulent diversion, after satisfying the note in the hands of a bona fide holder by a transfer of land, his damages will be measured by the value

Strange v. Wigney, 6 Bing. 677; *Snow v. Leatham*, 2 Car. & P. 314. And see §§ 1000, 1025, *supra*.

¹¹⁷ *Byles, Bills*, 412; *King v. Ham*, 6 Allen (Mass.) 298. And see § 1732, *infra*.

¹¹⁸ *Booth v. Powers*, 56 N. Y. 22, reversing 59 Barb. (N. Y.) 331; *Potter v. Bank*, 28 N. Y. 641; *Mercer v. Jones*, 3 Camp. 477; *McPeters v. Phillips*, 46 Ala. 496; *Zelgler v. Wells*, 23 Cal. 179; *Menkens v. Menkens*, 23 Mo. 252; *Bredow v. Institution*, 28 Mo. 181.

¹¹⁹ So held, as to bank notes, in *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1. And as to notes in general, in *St. John v. O'Connel*, 7 Port. (Ala.) 466. And the jury may include interest, though not averred in the declaration, and although no special damage is claimed. *Palne v. Pritchard*, 2 Car. & P. 558.

¹²⁰ *Thayer v. Manley*, 73 N. Y. 305. And evidence is admissible tending to show that the bill was not valid. *Zelgler v. Wells*, 23 Cal. 179. Or that the maker was insolvent. *Latham v. Brown*, 16 Iowa, 118; *McPeters v. Phillips*, 46 Ala. 496.

¹²¹ *Rose v. Lewis*, 10 Mich. 483.

¹²² *Alsager v. Close*, 10 Mees. & W. 576.

of the land transferred.¹²³ And, in general, the damages recoverable in trover will not exceed the amount due on the bill at the time of the verdict.¹²⁴ The recovery in trover and payment of the damages awarded divest the property of the plaintiff in the bill, and vest it in the defendant.¹²⁵

Equity Proceedings—General Principles.

§ 1685. A court of equity has jurisdiction only where legal remedies fail.¹²⁶ It may, by creditors' bill, enforce a judgment against lands of the defendants (where that is necessary), but in so doing it must preserve the successive rights of the parties to the bill.¹²⁷ Where a note is secured by mortgage, however, the holder may

¹²³ *Hynes v. Patterson*, 28 Hun (N. Y.) 528, affirmed in 95 N. Y. 1.

¹²⁴ *H. S. Benjamin Wagon & Carriage Co. v. Merchants' Exch. Bank*, 63 Wis. 470, 23 N. W. 502. But, if a bond is payable in gold, its gold value is recoverable. *Simpkins v. Low*, 49 Barb. (N. Y.) 382. And it has been held that a special value, known to the defendant, and represented by its market value, may be recovered. *Griffith v. Burden*, 35 Iowa, 138.

¹²⁵ *Byles*, Bills, 412; *Holmes v. Wilson*, 10 Adol. & E. 511; *Cooper v. Willomatt*, 1 C. B. 672. From the period of the conversion. *Cooper v. Shepherd*, 3 C. B. 266.

¹²⁶ *Bank of U. S. v. Weisiger*, 2 Pet. 331. Thus, it will not lie to recover the amount of a note which the defendant has wrongfully gotten into his possession, and holds against the rightful owner. *Searcy v. Miller*, 57 Iowa, 613, 10 N. W. 912. Nor to enforce a note in favor of the deceased payee's widow (who might sue at law in the administrator's name). *Nash v. Hogan*, 45 N. J. Eq. 108, 16 Atl. 433. Nor to enforce a note against the heirs of the deceased maker (the statute giving a remedy purely legal). *Edwards v. McClave*, 55 N. J. Eq. 151, 35 Atl. 829. Nor to enforce an agent's lien upon stock scrip for advances, when the collateral was in his own control. *Whitaker v. Gas Co.*, 16 W. Va. 717. Nor for specific performance of an agreement to give a note for a machine purchased. *Johnson v. Hoover*, 72 Ind. 395. But see *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461, contra. And equity may enforce an indorsement made in trust for a specific purpose. *Lawatsch v. Cooney*, 86 Hun, 546, 33 N. Y. Supp. 775. Or the obligor's stipulation in a bond for its registration at holder's option. *Benwell v. City of Newark*, 55 N. J. Eq. 260, 36 Atl. 668. And a court having both law and equity powers may entertain proceedings for specific performance of an agreement to accept a bill, and award damages as at law. *Larios v. Gurety*, L. R. 5 P. C. 346.

¹²⁷ *Shenandoah Val. Nat. Bank v. Bates*, 20 W. Va. 210.

proceed at the same time at law on the note and in equity on the mortgage.¹²⁸ But where a note is given for land, with right of re-possession by the vendor on nonpayment of the note, he must elect between a proceeding in equity to enforce the agreement and a suit at law on the note.¹²⁹ A court of equity cannot be invoked to enforce a defense which is admissible at law;¹³⁰ e. g. to compel the surrender of a note already past due, because of alleged payment.¹³¹ And where an injunction is granted on the double ground of fraud and of payment before transfer to the plaintiff after maturity, and the injunction is dissolved on a denial of fraud and failure to prove it, the court will not retain jurisdiction upon the ground of

¹²⁸ *Ober v. Gallagher*, 93 U. S. 199; *Olds v. Cummings*, 31 Ill. 188. So, the holder of a bill may proceed at the same time by attachment against the drawee and by bill in equity for return of the consideration. *Leger v. Bonnaffe*, 2 Barb. (N. Y.) 475. Or by action for trover and suit in equity for specific performance. *Lawatsch v. Cooney*, 86 Hun, 546, 33 N. Y. Supp. 775.

¹²⁹ *Arbuckle v. Hawks*, 20 Vt. 538.

¹³⁰ E. g. because of a prior action on the note and execution satisfied. *Finley v. Thayer*, 42 Ill. 350. Or of another action pending at law. *Quebec Bank v. Weyand*, 30 Ohio St. 126. Or the want of consideration which can be set up at law. *Geer v. Kissam*, 3 Edw. Ch. (N. Y.) 129. Or to enforce a set-off which might be pleaded. *Perkins v. Clements*, 1 Pat. & H. (Va.) 141. Or because the note had been paid. *Fowler v. Palmer*, 62 N. Y. 533; *Allerton v. Belden*, 49 N. Y. 373. Or at suit of the indorser, on account of payment by the maker. *Williams v. Stewart*, 56 Ga. 663. Or because the holder had proved the debt against the insolvent acceptor, and received a dividend and discharged the acceptor, which amounted to a legal discharge of the drawer also (the complainant). *Gardner v. Lee*, 11 Barb. (N. Y.) 558. Unless the matter of defense arose after judgment rendered, e. g. where there was a judgment against the maker, and a subsequent judgment against the indorser, and the indorser was afterwards discharged by dismissal of the first suit pending appeal. *Lewis v. Armstrong*, 47 Ga. 289.

¹³¹ *Fowler v. Palmer*, 62 N. Y. 533. Or to prevent a collecting agent from returning the note to his principal because of alleged fraud in its inception. *Galusha v. Bank*, 1 Hun (N. Y.) 573. Or to procure the cancellation of an acceptance merged in a subsequent cognovit, and afterwards transferred to the defendant with the judgment, unless the defendant (who could not recover at law) was wrongfully in possession of the bill. *Jones v. Lane*, 3 Young & C. Exch. 281. But it has been held that a bill in equity will lie against the original payee of a note after its maturity to obtain specific performance of a contract to cancel and surrender it. *Tuttle v. Moore*, 16 Minn. 123 (Gil. 112).

the alleged payment, which is admissible as a defense at law.¹³² Equity will not relieve a party on the ground of a defense which might have been set up at law, and was not set up by reason of the complainant's mistake as to his right to do so.¹³³

In other cases equitable jurisdiction is due to the character or relation of the parties; e. g. to support a creditors' bill in aid of an attachment against the note of a nonresident payee in the hands of his resident agent;¹³⁴ or by a partner (payee) to enforce a partnership note;¹³⁵ or against a corporation, which was really the maker of a note signed by directors, who omitted the corporate name by inadvertence;¹³⁶ or for contribution against several co-sureties,¹³⁷ or (in case of insolvency of one co-surety) against other co-sureties for more than their original proportionate share.¹³⁸

And a court of equity will entertain a bill of interpleader to determine the conflicting right of an attachment creditor and an indorsee (after attachment, but before maturity) claiming as a bona fide holder.¹³⁹ A suit will also lie in equity on a bill filed by a mortgagor to settle the equities between the holders of several notes secured by a mortgage and collateral note, and will enjoin the collection of the latter.¹⁴⁰ So, a court of equity may grant a writ of ne exeat against the maker of a note who is about to leave the state, and remove his property, without providing for the payment of the note, although no fraud is alleged, and although other parties jointly liable are not joined in the suit.¹⁴¹

Equity will also take jurisdiction to enforce the holder's rights as

¹³² *Little v. Cooper*, 11 N. J. Eq. 224. And see *Petty's Adm'rs v. Young* (N. J. Ch.) 9 Atl. 377.

¹³³ *Dickerson v. Commissioners*, 6 Ind. 128.

¹³⁴ *McCann v. Randall*, 147 Mass. 91, 17 N. E. 75.

¹³⁵ *Davis v. Merrill*, 51 Mich. 480, 16 N. W. 864.

¹³⁶ *In re Pendleton Hardware Co.*, 24 Or. 330, 33 Pac. 544.

¹³⁷ *Adams v. Hayes*, 120 N. C. 383, 27 S. E. 47.

¹³⁸ *Fischer v. Galther*, 32 Or. 161, 51 Pac. 736.

¹³⁹ *Briant v. Reed*, 14 N. J. Eq. 271; *Fitch v. Brower*, 42 N. J. Eq. 300, 11 Atl. 330. Where the complainant's liability has not become already established by judgment at law against him in favor of both claimants. *McKinney v. Kuhn*, 59 Miss. 186. And see § 818, *supra*.

¹⁴⁰ *Walker v. Jones*, L. R. 1 P. C. 50.

¹⁴¹ *Fitzgerald v. Gray*, 59 Ind. 254.

to a trust or lien.¹⁴² But where a firm, on its dissolution, divides its assets and liabilities, the assumption of liabilities by a partner will not fasten a trust upon the assets turned over to him.¹⁴³ So, the mere silence of an indorser as to the fact that the maker is an infant will not amount to a breach of trust to give jurisdiction to a court of equity.¹⁴⁴ Nor will such court relieve an indorser or surety on the ground that the holder fails to proceed with his execution against the maker,¹⁴⁵ or that he has taken a judgment against the maker and indorsers, and has agreed to discharge another surety after partial satisfaction of his execution by a prior indorser.¹⁴⁶ So, a court of equity will not create a liability where the law does not; e. g. to hold an indorser who has been discharged at law for want of notice of dishonor.¹⁴⁷

Reform and Cancellation of Bills.

§ 1686. Equity will, in a proper case, reform a bill and correct mistakes, although made by the complainant himself.¹⁴⁸ Thus, it

¹⁴² E. g. in favor of the holder of a draft drawn expressly against a shipment, and payable out of the proceeds, and with the warehouse receipt attached to it. *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362. Or for the application, in favor of a first indorser, of funds furnished to the second indorser by the maker (for whom both signed as accommodation indorsers), for the express purpose of taking up the note. *Price v. Trusdell*, 28 N. J. Eq. 200. Or to compel a pledgee to collect and apply proceeds. *Baker v. Burkett*, 75 Miss. 89, 21 South. 970.

¹⁴³ *Giddings v. Palmer*, 107 Mass. 269.

¹⁴⁴ *People's Bank's Appeal*, 93 Pa. St. 107. And, for remedies in equity against an infant maker, see § 270, *supra*.

¹⁴⁵ *Lenox v. Prout*, 3 Wheat. 520.

¹⁴⁶ *Love v. Allison*, 2 Tenn. Ch. 111.

¹⁴⁷ *Dean v. Marsteller*, 2 Cranch, C. C. 121, Fed. Cas. No. 3,710.

¹⁴⁸ *Ball v. Storie*, 1 Sim. & S. 210; *Lee v. Percival*, 85 Iowa, 639, 52 N. W. 543; *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381. So, where the complainant, by mistake, signed her own name as drawer of a bill renewed by her as administratrix of the deceased drawer. *Druiff v. Lord Parker*, L. R. 5 Eq. 131. Or where the order of accommodation indorsements was changed, by fraud or mistake, in a renewal signed in blank without such intention. *Slagle v. Rust*, 4 Grat. (Va.) 274. Or where the amount was fixed by a mistaken calculation. *Spinning v. Sullivan*, 48 Mich. 5, 11 N. W. 758. Or to change the place of payment in a renewal, "at said bank," to that of the original note, "at the G. Bank." *German Nat. Bank v. Louisville Butchers' Hide & Tallow*

will compel an indorsement which has been omitted by mistake or accident.¹⁴⁹ And it will enforce against a wife's separate estate a note made by her husband as "acting trustee," although it could not be enforced at law.¹⁵⁰ Equity will in like manner decree a bill to be void *ab initio*, or will order its cancellation.¹⁵¹ So, a person whose name has been forged to a note, although he has a legal defense, may apply to a court of equity before maturity, and have the note declared void as to him.¹⁵² And it has even been held that equity will relieve a party against a mortgage securing his note at an exorbitant rate of interest.¹⁵³ So, it will restrain the payee of a note for marriage brokerage from transferring it.¹⁵⁴ And it will decree the surrender of municipal bonds issued in violation of law,¹⁵⁵ or a note that has been paid.¹⁵⁶

Co., 97 Ky. 34, 29 S. W. 882. Or to restore and enforce a note which has been inadvertently altered. *Wallace v. Tice* (Or.) 51 Pac. 733; *McClure v. Little*, 15 Utah, 379, 49 Pac. 298. But not on conflicting evidence as to whether there was a mistake. *George v. Howard*, 56 Iowa, 646, 10 N. W. 212. And equity need not be invoked to supply manifest omission in filling blanks, e. g. with the word "months" or "1." *Loomis v. Freer*, 4 Ill. App. 447.

¹⁴⁹ *Hughes v. Nelson*, 29 N. J. Eq. 547. So, it will compel indorsement by an executor after delivery by his testator without indorsement. *Smith v. Pickering, Peake*, 50; *Hodge v. Cole*, 140 Mass. 116, 2 N. E. 774. And see §§ 793, 809, *supra*.

¹⁵⁰ *Baker v. Gregory*, 28 Ala. 544.

¹⁵¹ *Bishop of Winchester v. Fournier*, 2 Ves. Sr. 445, 7 Ves. 413, and 2 Ves. & B. 302; *Mackworth v. Marshall*, 3 Sim. 368. Especially if in the hands of the payee. *Breathwit v. Rogers*, 32 Ark. 758. So, of a negotiable note given by the maker as a *donatio causa mortis*. *Smith v. Smith*, 30 N. J. Eq. 564. Or a nonnegotiable note obtained by fraud and in the hands of a holder *mala fide*, the holder being, in such case, the only necessary party, and the intermediate bona fide indorser unnecessarily joined as defendant not being liable, therefore, for costs. *Campodonico v. Grossini*, 66 Cal. 358, 5 Pac. 609. But it will not enjoin the payment of bonds unlawfully issued for a valid debt. *Scott v. Twombly*, 20 App. Div. 652, 46 N. Y. Supp. 1084.

¹⁵² *Huston v. Roosa*, 43 Ind. 517.

¹⁵³ *Brown v. Hall*, 14 R. I. 249. Or against a note reserving legal interest until maturity, and usurious interest afterwards. *Bang v. Windmill Co.*, 96 Tenn. 361, 34 S. W. 516.

¹⁵⁴ *Smith v. Haytwell*, 1 Amb. 66.

¹⁵⁵ *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 6 Sup. Ct. 88.

¹⁵⁶ *Fitzmaurice v. Mosier*, 116 Ind. 363, 16 N. E. 175, and 19 N. E. 180.

In like manner, equity may require the reform¹⁵⁷ or cancellation¹⁵⁸ of a bill for fraud. So, it will require the surrender of a note given by the complainant to suppress a prosecution for cheating at cards.¹⁵⁹ And even where a note has been made by a husband for the purpose of depriving his wife of her interest in his estate, with a condition for its redelivery to him on his return from a proposed journey, a court of equity will interfere in his favor with a perpetual injunction, or an order for its surrender.¹⁶⁰

And where the jurisdiction is invoked on the ground of fraud or conspiracy, and the complainant fails to prove such facts, equity may still declare the transfer to be void on the ground of surprise coupled with evidence of mental weakness.¹⁶¹ But it has been held that a bill in equity will not lie for the cancellation of a note given by the complainant to compound a felony;¹⁶² or on the ground of a fraud or forgery, which was made possible by the maker's own negligence in executing the paper.¹⁶³ But the fact that the complainant has failed in an action of trover for the note will not oust a court of equity of jurisdiction on a bill for its surrender.¹⁶⁴ But the surrender of a bill will be decreed only where its detention by the defendant is inequitable.¹⁶⁵

Injunction against Issue or Transfer.

§ 1687. A court of equity will restrain the issue of municipal bonds in violation of the statute,¹⁶⁶ even though the illegality could be set up as a defense against all holders.¹⁶⁷ So, it will restrain the negotiation of a bill which has been obtained by fraud, because the

¹⁵⁷ *Graham v. Guinn* (Tenn. Ch. App.) 43 S. W. 749.

¹⁵⁸ *Salter v. Krueger*, 65 Wis. 217, 26 N. W. 544; *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364.

¹⁵⁹ *Osbaldiston v. Simpson*, 13 Sim. 513.

¹⁶⁰ *Metler v. Metler's Adm'r*, 19 N. J. Eq. 457, affirming 18 N. J. Eq. 270.

¹⁶¹ *Hoagland v. Titus*, 16 N. J. Eq. 44.

¹⁶² *Atwood v. Flisk*, 101 Mass. 363. And see § 503, *supra*.

¹⁶³ *Hardy v. Brler*, 91 Ind. 91.

¹⁶⁴ *Byles, Bills*, 413; *Lisle v. Liddle*, 3 Anstr. 649.

¹⁶⁵ *Jones v. Lane*, 3 Younge & C. Exch. 281.

¹⁶⁶ *Scotland Co. v. Hill*, 112 U. S. 183, 5 Sup. Ct. 93; *Reineman v. Railroad Co.*, 7 Neb. 310; *George v. Cleveland* (Neb.) 74 N. W. 266.

¹⁶⁷ *Lynchburg & R. St. Ry. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951.

defense, although good at law, would not be available if the bill came into the hands of a bona fide purchaser before maturity.¹⁶⁸ So, an injunction will be granted, at the suit of a state, to restrain the transfer of bonds which have been negotiated by its agent without authority, or upon unauthorized terms.¹⁶⁹ So, where a note is given for land conveyed with a fraudulent and worthless warranty of title, an injunction against the transfer of the note will be granted on a bill of quia timet.¹⁷⁰ So, where a note has been delivered for a special purpose, its diversion may be prevented by injunction against an indorsee after maturity.¹⁷¹ In like manner, a surety may obtain an injunction against the transfer of a usurious note, although the principal cannot be joined as a co-complainant without his consent.¹⁷² And where a note comes into the possession of a fraudulent holder, and is allowed as a claim against the estate of the deceased maker without opportunity to the rightful owner to prove his title, an injunction will be granted against payment by the administrator until the question of title is determined.¹⁷³ But an injunction against the transfer of a note, with a notice of lis pendens and a decree for surrender of the note, will not affect a subsequent purchaser without notice.¹⁷⁴

Injunction against Suit.

§ 1688. A court of equity may also restrain the bringing of an action upon a bill, or the setting up of a legal defense to such action.¹⁷⁵ Thus, it will enjoin the customer of a bank from bringing

¹⁶⁸ *Bromley v. Holland*, 7 Ves. 20; *Jervls v. White*, Id. 413; *De Vries v. Shumate*, 53 Md. 211; *Hullhorst v. Scharner*, 15 Neb. 57, 17 N. W. 259; *Dickenson v. Investment Co.*, 93 Va. 498, 25 S. E. 548. As to proper parties in such action, see *Foley v. Carlon*, *Younge*, 373.

¹⁶⁹ *Delafield v. State of Illinois*, 2 Hill (N. Y.) 159, affirming 8 Paige (N. Y.) 527.

¹⁷⁰ *Johnston v. Powell*, 34 Tex. 528. But not in such case against a bona fide holder. *Kittridge v. Batchelder*, 47 Vt. 64.

¹⁷¹ *Atlantic De Laine Co. v. Tredick*, 5 R. I. 171.

¹⁷² *Morse v. Hovey*, 9 Paige (N. Y.) 197.

¹⁷³ *McKinney v. Curtiss*, 60 Mich. 611, 27 N. W. 691.

¹⁷⁴ *Durant v. Iowa Co.*, 1 Woolw. 69, Fed. Cas. No. 4,189. And an injunction against the payee after transfer by him will not bind his transferee. *Morrison v. Bean*, 25 Tex. Supp. 442.

¹⁷⁵ *Byles*, Bills, 421; *Glyn v. Soares*, 3 Mylne & K. 450; *Hodgson v. Mur-*
(2400)

suit against the bank on its refusal to pay his check after he has procured bills to be discounted largely exceeding his deposits, and is in failing circumstances.¹⁷⁶ So, a bona fide holder will be restrained from bringing suit at the instance of a payee whose indorsement has been forged, and the cancellation of the bill will be decreed.¹⁷⁷ But where the bill is payable to a married woman, and her indorsement is forged by her husband, in whose possession the bill was at the time, equity will not interfere in her behalf to restrain a subsequent holder from bringing suit against the acceptor.¹⁷⁸ A holder with notice will, however, be restrained from suit against the acceptor after failure of the consideration and insolvency of the payee.¹⁷⁹ But if a note is given by A. to B., at the request and for the benefit of C., who thereupon, in consideration of it, gives his note to A., an injunction will not be granted against a suit on the latter note on the ground that the former has not been paid.¹⁸⁰

An injunction against payment will not prevent recovery of judgment upon a bill.¹⁸¹ And an injunction may be refused against the collection of a note, on the ground of misrepresentation as to the consideration, and of an agreement to pay in certain installments, until after judgment is rendered, and the execution be then stayed.¹⁸² But, where there has been default on an agreement to credit certain payments, an injunction will be granted against the entry of judg-

ray, 2 Sim. 515; *Hood v. Aston*, 1 Russ. 412; *Kidson v. Dilworth*, 5 Price, 564. Thus, it may enforce an equitable estoppel by restraining a legal defense. *Hackettstown Nat. Bank v. Ming*, 52 N. J. Eq. 157, 27 Atl. 920. Or it may enjoin an action at law on a note obtained by fraud. *Hodson v. Glass Co.*, 156 Ill. 397, 40 N. E. 971. Or on a note given in renewal of other notes which had been satisfied. *Baker v. Hawkins*, 14 R. I. 359.

¹⁷⁶ *Agra, etc., Bank v. Hoffman*, 34 Law J. Ch. 285.

¹⁷⁷ *Esdalle v. La Nauze*, 1 Younge & C. Exch. 394; *Jones v. Lane*, 3 Younge & C. Exch. 281. But not in behalf of an acceptor who alleges that he accepted the bill on the strength of a forged collateral bill of lading, if the holder undertakes to surrender the bill in case of an adverse judgment at law. *Thiedemann v. Goldschmidt*, 1 De Gex, F. & J. 4.

¹⁷⁸ *Dawson v. Prince*, 2 De Gex & J. 41.

¹⁷⁹ *Ferguson v. Fisk*, 28 Conn. 501.

¹⁸⁰ *Savage v. Ball*, 17 N. J. Eq. 142.

¹⁸¹ *Campbell v. Gilman*, 26 Ill. 120.

¹⁸² *Bridges v. Robinson*, 2 Tenn. Ch. 720.

ment for the whole amount.¹⁸³ But in a bill to enjoin a sale under a judgment the court will not pass upon the consideration of the note on which the judgment was founded.¹⁸⁴ And it will not set aside a judgment at law suffered by a married woman to avoid her note for coverture.¹⁸⁵

§ 1689. — An injunction will not be granted to the maker of a note to restrain a suit against him by the payee, on the ground that the note was a mere memorandum of the sale of goods by the maker as the payee's agent, for which goods the maker had, for convenience, taken the purchaser's note to himself, the payee of the original note agreeing to use it only as a memorandum.¹⁸⁶ So, where an action is brought on an acceptance given for goods purchased, and the acceptor claims that he has been fraudulently deceived, an injunction will not be granted to restrain a suit on the acceptance and for an accounting, inasmuch as a court of equity will not adjust an account between debts, on the one side, and a claim for damages, on the other.¹⁸⁷ And an injunction will not be granted, on account of fraud by the payee upon the maker, to restrain an action by a bona fide holder.¹⁸⁸ But one who is not a "bona fide holder" in the commercial sense of the term is not entitled to the same protection.¹⁸⁹ Where a defendant would be entitled to relief on equitable grounds against a judgment, if it were obtained, he is now allowed, in England, in an action at law, to plead the facts entitling him to such relief.¹⁹⁰ But an equitable plea is only allowed where full justice can be done in a court of law in the suit pending.¹⁹¹ After such plea, and an adverse verdict upon it, the defendant cannot have relief on the same grounds in equity.¹⁹²

¹⁸³ *Hentig v. Sweet*, 27 Kan. 172.

¹⁸⁴ *Garrison v. Cobb*, 106 Ind. 245, 6 N. E. 332.

¹⁸⁵ *Wilson v. Coolidge*, 42 Mich. 112, 3 N. W. 285.

¹⁸⁶ *Anthony v. Valentine*, 130 Mass. 119.

¹⁸⁷ *Glennie v. Imri*, 3 Younge & C. Exch. 436.

¹⁸⁸ *Dougherty v. Scudder*, 17 N. J. Eq. 248. Or against a bona fide pledgee for fraudulent diversion by the payee. *Bond v. Wiltse*, 12 Wis. 683.

¹⁸⁹ *Farrington v. Bank*, 24 Barb. (N. Y.) 554.

¹⁹⁰ 17 & 18 Vict. c. 125, § 84.

¹⁹¹ *Wodehouse v. Farebrother*, 5 El. & Bl. 277; *Wood v. Miners' Co.*, 17 C. B. 561; *Drain v. Harvey*, Id. 257.

¹⁹² *Terrell v. Higgs*, 26 Law J. Ch. 837. But see *Byles, Bills*, 421; *Evans v. Bremridge*, 25 Law J. Ch. 334; *Prothero v. Phelps*, Id. 105.

On the other hand, relief will not be refused in equity because the complainant has a technical defense at law on other grounds, such as the statute of limitations.¹⁹³

Bill for Discovery.

§ 1690. A complainant might formerly file a bill in equity for discovery, in aid of an action at law, upon a bill of exchange or for its proceeds.¹⁹⁴ And where discovery is necessary, as in the case of an alteration made by mistake, to sustain a recovery on the bill as originally drawn, a bill in equity will lie.¹⁹⁵ And such action may be brought for a discovery and further remedy, although the remedy subsequent to discovery is perfect at law.¹⁹⁶ A defendant in an action at law, seeking a discovery for the purpose of establishing a defense, should set out his expected defense.¹⁹⁷ And a bill cannot be filed for discovery on a charge of crime.¹⁹⁸ And the necessity for a bill of discovery is now obviated in England, as well as in many of the United States, by the power of interrogating the other party in a suit at law.¹⁹⁹

¹⁹³ *Hastings v. Belden*, 55 Vt. 273.

¹⁹⁴ *Byles*, Bills, 421; *Thomas v. Tyler*, 3 Younge & C. Exch. 255; *Wilkinson v. L'Eaugler*, 2 Younge & C. Exch. 366.

¹⁹⁵ *Lewis v. Schenck*, 18 N. J. Eq. 459.

¹⁹⁶ E. g. where the note is diverted from the payee's executor and indorsed by another person of the payee's name. *Pearce v. Creswick*, 2 Hare, 286.

¹⁹⁷ *Deas v. Harvie*, 2 Barb. Ch. (N. Y.) 448.

¹⁹⁸ *Fleming v. St. John*, 2 Sim. 181; *Whitmore v. Francis*, 8 Price, 616, 2 Sim. 182, note.

¹⁹⁹ 17 & 18 Vict. c. 125, § 51; *Whateley v. Crowter*, 5 El. & Bl. 709.

II. ACTION ON LOST BILLS.

- § 1691. Notice of Loss.
- 1692. Action on Lost Bill—New Promise.
- 1693. Indemnity Required.
- 1694. — Unnecessary.
- 1695. — Tender of.
- 1696. Action in Equity.
- 1697. — At Law.
- 1699. Statutes—Law and Equity Blended.
- 1700. Loss—How Pleaded.
- 1701. — Evidence—Affidavits.
- 1703. Evidence of Contents.

Notice of Loss.

§ 1691. The owner of a bill which is lost should at once give notice personally to the parties liable upon it, to prevent their taking it up without due inquiry.²⁰⁰ And some statutes require such notice to be given immediately.²⁰¹ It is also required, in Louisiana, that proof be made, not only of the loss of a bill, but of public advertisement of the loss, in order to support a recovery on it as a lost instrument.²⁰² And, if the note contains a written promise by the indorser to pay notwithstanding his discharge, the loss of the promise as well as of the note must be advertised.²⁰³ But it is, in general, sufficient if due advertisement appears from all the evidence in the case.²⁰⁴ And, if the bill has been absolutely destroyed, it is not necessary to allege an advertisement of the loss.²⁰⁵

²⁰⁰ Byles, Bills, 379; Chit. Bills, 289; 2 Daniel, Neg. Inst. 467; 1 Edw. Bills & N. § 434; 2 Pars. Notes & B. 255. And a verdict found against the loser on the ground that he gave no notice of the loss for more than a week will not be disturbed. *Beckwith v. Corral*, 3 Bing. 444, 11 Moore, 335.

²⁰¹ ARGENTINE REPUBLIC (Code Com. art. 886); BELGIUM (Code Nap.); BRAZIL (Code Com. art. 389); CHILI (Code Com. art. 708); FRANCE (Code Com. art. 153); GENEVA (Code Nap.); GREECE (Code Nap.); HAYTI (Code Nap. § 150); ITALY (Code Com. art. 239); PERU (Code Com. art. 462); SAN DOMINGO (Code Nap.); TURKEY (Code Nap. § 110); URUGUAY (Code Com. art. 903).

²⁰² *Lewis v. Splane*, 2 La. Ann. 754.

²⁰³ *New Orleans & C. R. Co. v. Armstrong*, 2 La. Ann. 829.

²⁰⁴ *Peace v. Head*, 12 La. Ann. 582.

²⁰⁵ *Beebe v. McNeill*, 8 La. Ann. 130.

At common law, publication is, of itself, neither indispensable nor (where notice is required) sufficient notice.²⁰⁶ Such notice should, however, be given; and the absence of it was formerly held to amount to negligence on the owner's part, to outweigh that of the purchaser, where both were at fault.²⁰⁷ But it is now immaterial upon this ground, since no negligence of a purchaser will affect the bona fides of his title, except so far as it amounts to evidence of bad faith.

Action on Lost Bills—New Promise.

§ 1692. Where a bank bill payable to bearer is lost, even an indemnity can afford no protection to the maker, if there are no means of identifying the bill. In such case no recovery can be had on mere circumstantial evidence of its destruction, e. g. of its probable loss in the Chicago fire.²⁰⁸ So, if a note is destroyed by the plaintiff himself fraudulently or without explanation, he cannot recover either on the paper itself or on the original consideration.²⁰⁹ But where a bank note has been cut in two for transmission by mail, and one-half is lost in the mail, the owner may recover against the bank on the half retained, since the bank could not be further liable on the other half to another as a bona fide holder.²¹⁰ And the bank cannot set up in its defense against the owner that it had announced it would not pay its notes under such circumstances.²¹¹

Suit on a lost note may be brought by an assignee of the debt

²⁰⁶ Byles, Bills, 380; 2 Daniel, Neg. Inst. 468. And see § 1023, *supra*.

²⁰⁷ Byles, Bills, 379; Chit. Bills, 290; 2 Daniel, Neg. Inst. 469; *Snow v. Peacock*, 3 Bing. 406, 11 Moore, 286; *Strange v. Wigney*, 6 Bing. 677. So, where the notice was actually misleading, e. g. by stating the loss of a pocketbook, and that its contents were of no use to any one but the owner. *Beckwith v. Corral*, 2 Bing. 445, 11 Moore, 335.

²⁰⁸ *Tower v. Bank*, 3 Allen (Mass.) 387.

²⁰⁹ *Blade v. Noland*, 12 Wend. (N. Y.) 173; *Booth v. Smith*, 3 Woods, 19 Fed. Cas. No. 1,649; *McDonald v. Jackson*, 56 Iowa, 643, 10 N. W. 223. But he may recover on a bank note that has been fraudulently destroyed by his servant. *Hagerstown Bank v. Adams Exp. Co.*, 45 Pa. St. 419. Or on a note destroyed carelessly by one to whom it was offered for sale. *Homborg v. Kikhaffer*, 43 Minn. 205, 45 N. W. 154.

²¹⁰ *Hinsdale v. Bank*, 6 Wend. (N. Y.) 378; *Patton v. Bank*, 2 Nott & McC. (S. C.) 464; *State Bank v. Aresten*, 4 Ill. 135.

²¹¹ *Martin v. Bank*, 4 Wash. C. C. 253, Fed. Cas. No. 9,156.

secured by it.²¹² But the owner of a note which is in the hands of an adverse holder cannot sue on it as lost.²¹³ Where a bill is lost, and, upon indemnity being given, a subsequent promise of payment is made, the owner may recover at law upon such promise.²¹⁴ But even an express promise to pay is of no effect without some new and binding consideration.²¹⁵

Indemnity Required.

§ 1693. In general, no recovery can be had on a negotiable instrument which has been lost, without indemnity to the party liable.²¹⁶ And the bond required in such case must be executed by the holder himself, as well as his surety,²¹⁷ and should be given to all the defendants, although some of them have not been served with process in the action.²¹⁸ Where a bill is lost in the mail, to sustain a recovery against the indorser the holder should demand a new bill of the drawer, and tender indemnity to the indorser.²¹⁹ So, indemnity is required, upon proof in bankruptcy,²²⁰ or foreclosure of a collateral mortgage securing a lost note,²²¹ or in suit upon a lost acceptance,²²² or a certificate of deposit payable on return of

²¹² *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981.

²¹³ *Read v. Bank*, 136 N. Y. 454, 32 N. E. 1083. But see *West Philadelphia Nat. Bank v. Field*, 143 Pa. St. 473, 22 Atl. 829.

²¹⁴ *Williamson v. Clements*, 1 Taunt. 553.

²¹⁵ *Davis v. Dodd*, 4 Taunt. 602.

²¹⁶ 2 *Daniel*, Neg. Inst. 470; 1 *Edw. Bills & N.* § 422; 2 *Pars. Notes & B.* 288; *Story*, Prom. Notes, § 107; *Miller v. Webb*, 8 La. 516; *Nalle v. Conrad*, 30 La. Ann. 503; *Freeman v. Boynton*, 7 Mass. 483; *West Philadelphia Nat. Bank v. Field*, 143 Pa. St. 473, 22 Atl. 829; *Wiedenfeld v. Gallagher* (Tex. Civ. App.) 32 S. W. 248. So, by statute in ILLINOIS (*Hurd's Rev. St. c. 98*, § 14); MARYLAND (*Pub. Gen. Laws*, art. 13, § 11); MICHIGAN (*How. Ann. St.* § 7519); MINNESOTA (*Gen. St.* § 5737); NEW JERSEY (2 *Gen. St.* p. 2005; § 7); NEW YORK (*Code Civ. Proc.* § 1917).

²¹⁷ *Howe Mach. Co. v. Avery*, 16 Hun (N. Y.) 555.

²¹⁸ *Higgins v. Watson*, 1 Mich. 428.

²¹⁹ *Riggs v. Graeff*, 2 Cranch, C. C. 298, Fed. Cas. No. 11,826.

²²⁰ *Ex parte Greenway*, 6 Ves. 812.

²²¹ *Yerkes v. Blodgett*, 48 Mich. 211, 12 N. W. 218.

²²² *Meeker v. Jackson*, 3 Yeates (Pa.) 442; *City of Bloomington v. Smith*, 123 Ind. 41, 23 N. E. 972.

the certificate,²²³ or a note payable to A. or bearer.²²⁴ So, on a stolen coupon, payable to bearer,²²⁵ or on a note lost with a blank indorsement,²²⁶ or even, it has been held, without any indorsement, since the payee might otherwise obtain it and transfer it again.²²⁷

Indemnity Unnecessary.

§ 1694. Where an action is brought on a lost instrument, and it is afterwards found and produced at the time of trial, indemnity need not be given.²²⁸ So, it is not necessary, where the lost note was nonnegotiable.²²⁹ And this has been held to be the case, also, where it was specially indorsed, and therefore, in effect, not negotiable.²³⁰ And it has been held not to be necessary, where the note is barred by the statute of limitations,²³¹ or where it was overdue, and therefore subject to defense, at the time of the loss.²³² A question has been raised whether indemnity is necessary in case of the loss of half a bank note in the mail. But the weight of au-

²²³ *Welton v. Adams*, 4 Cal. 37; *Schmidt v. Bank*, 153 Mass. 550, 27 N. E. 595.

²²⁴ *Adams v. Edmunds*, 55 Vt. 353.

²²⁵ *Hinckley v. Railroad Co.*, 129 Mass. 52; *Rolston v. Railroad Co.*, 21 Misc. Rep. 439, 47 N. Y. Supp. 650; *Id.*, 29 Misc. Rep. 656, 46 N. Y. Supp. 383.

²²⁶ *Fales v. Russell*, 16 Pick. (Mass.) 315.

²²⁷ *Lewis v. Petayvin*, 4 Mart. N. S. (La.) 4.

²²⁸ *Smith v. Rockwell*, 2 Hill (N. Y.) 482.

²²⁹ *Wright v. Wright*, 54 N. Y. 437, affirming 59 Barb. (N. Y.) 505; *Allen v. Reilly*, 15 Nev. 452; *Coon v. Bonchard*, 74 Mich. 496, 42 N. W. 72; *Rolston v. Railroad Co.*, 21 Misc. Rep. 439, 47 N. Y. Supp. 650; *Wofford v. Holmes Co.*, 44 Miss. 579.

²³⁰ *Dudman v. Earl*, 49 Iowa, 37; *Lamson v. Pfaff*, 1 Handy (Ohio) 449; *Kirkwood v. Bank*, 40 Neb. 484, 58 N. W. 1016; *Id.*, 40 Neb. 497, 58 N. W. 1135; *Palmer v. Carpenter* (Neb.) 73 N. W. 690.

²³¹ Either at the time the note is lost (*Moore v. Fall*, 42 Me. 450) or at the time of trial (*Torrey v. Foss*, 40 Me. 74).

²³² *Brent v. Ervin*, 3 Mart. N. S. (La.) 303; *Mowery v. Mast*, 14 Neb. 510, 16 N. W. 839; *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1067; *Means v. Kendall*, 35 Neb. 693, 53 N. W. 610; *Kirkwood v. Bank*, 40 Neb. 484, 58 N. W. 1016; *Id.*, 40 Neb. 497, 58 N. W. 1135. Although necessary, if lost before maturity, *Elliott v. Woodward*, 18 Ind. 183.

thority seems to be in favor of requiring indemnity to the bank in such case,²³³ although some cases hold to the contrary.²³⁴

A distinction has also been made between lost bills and bills that have been destroyed, as regards the need of indemnity. In Massachusetts, and other states which follow the same rule, an indemnity is necessary to support a recovery on a note which has been destroyed.²³⁵ But in New York such notes are not within the statute requiring an indemnity to be given.²³⁶

Tender of Indemnity.

§ 1695. The plaintiff, who sues on a lost bill or note, should tender an indemnity bond, on the risk of having to pay costs.²³⁷ But the failure to make such offer before commencing suit will only affect his right to recover damages and costs.²³⁸ On filing a bill in equity, indemnity should be proffered in the bill, under the direction of the court, but need not be formally tendered at the beginning of the suit.²³⁹ A court of common law has, in general, no power

²³³ *Mossop v. Eadon*, 16 Ves. 430; *Bank of Virginia v. Ward*, 6 Munf. (Va.) 166; *Farmers' Bank v. Reynolds*, 4 Rand. (Va.) 186; *Bullet v. Bank*, 2 Wash. C. C. 172, Fed. Cas. No. 2,125; *Armat v. Bank*, 2 Cranch, C. C. 180, Fed. Cas. No. 535; *Commercial Bank v. Benedict*, 18 B. Mon. (Ky.) 307; *Allen v. Bank*, 21 N. C. 3; *Murdock v. Bank*, 2 Rob. (La.) 112; *Little v. Association*, 2 La. Ann. 1012.

²³⁴ 2 Pars. Notes & B. 313; *Redmayne v. Burton*, 2 Law T. (N. S.) 324; *State Bank v. Aresten*, 4 Ill. 135; *Union Bank v. Warren*, 4 Sneed (Tenn.) 167.

²³⁵ *McGregory v. Gregory*, 107 Mass. 543; *Armstrong v. Lewis*, 14 Minn. 406 (Gil. 308); *Price v. Dunlap*, 5 Cal. 483. So, of bank notes. *Commercial Bank v. Benedict*, 18 B. Mon. (Ky.) 307; *Wade v. Banking Co.*, 8 Rob. (La.) 140. But an action will not lie on bank notes which cannot be identified, on circumstantial evidence of their destruction and tender of indemnity. *Tower v. Bank*, 3 Allen (Mass.) 387.

²³⁶ *Des Arts v. Leggett*, 16 N. Y. 582, 5 Duer (N. Y.) 156; *Blandin's Adm'r v. Wade*, 20 Kan. 251. So, upon a check destroyed on the day it was received. *Scott v. Meeker*, 20 Hun (N. Y.) 161.

²³⁷ *Banque Jacques Cartier v. Strachan*, 5 U. C. Prac. 159. So, in an action on a bank note of which one-half has been lost. *Farmers' Bank v. Reynolds*, 4 Rand. (Va.) 186.

²³⁸ *Allen v. Bank*, 21 N. C. 3. And this is required by statute in MICHIGAN. How. Ann. St. § 7519.

²³⁹ *Exchange Bank v. Morrall*, 16 W. Va. 546.

to stay proceedings until a bond of indemnity is given.²⁴⁰ But by statute in Great Britain it may order that the loss of a bill or note shall not be set up by the defendant, if indemnity is given.²⁴¹ And a plea setting up the loss of a bill may be struck out, if the plaintiff gives indemnity and pays the costs.²⁴² By an earlier act it was provided in Great Britain that the drawer of a lost bill may be compelled to give a new instrument, upon indemnity being given him.²⁴³ This act, however, gave no jurisdiction to common-law courts in the case of a lost bill or note.²⁴⁴ And a court of equity might not only compel the giving of a new bill, but enforce the payment of the lost bill.²⁴⁵ The statute has therefore not been generally enacted in the United States, and has not effectively enlarged the jurisdiction of the courts in case of the loss of negotiable paper.

Action in Equity.

§ 1696. Where no right of action existed at common law upon a lost bill or note, the owner might resort to a court of equity for relief.²⁴⁶ And this was his only remedy on a lost note payable

²⁴⁰ *Aranguren v. Schofield*, 1 Hurl. & N. 494. But in Connecticut a court of law may require an indemnity bond. *Bridgeford v. Manufacturing Co.*, 34 Conn. 546. And in Alabama execution cannot issue until indemnity is given. Code, § 32.

²⁴¹ 17 & 18 Vict. c. 125, § 87; Bills of Exchange Act, § 70. And the statute includes bank notes. *Noble v. Bank*, 2 Hurl. & C. 355; *McDonnell v. Murray*, 9 Ir. C. L. 495.

²⁴² *King v. Zimmerman*, L. R. 6 C. P. 466; *Noble v. Bank*, 2 Hurl. & C. 355; *McDonnell v. Murray*, 9 Ir. C. L. 495; *Ringrose v. Blizard*, 2 Fost. & F. 375.

²⁴³ 9 & 10 Wm. III. c. 17, § 3, extended to notes by 3 & 4 Anne, c. 9; Bills of Exchange Act, § 69. This statute has been enacted also in MISSISSIPPI (*Ann. Code*, § 3512) and NEW JERSEY (2 Gen. St. p. 2605, § 6).

²⁴⁴ *Ex parte Greenway*, 6 Ves. 812; *Davies v. Dodd*, 4 Price, 176; *Toulmin v. Price*, 5 Ves. 238; *Bromley v. Holland*, 7 Ves. 19, 242.

²⁴⁵ *Byles, Bills*, 384; *Chit. Bills*, 300; *Walmsley v. Child*, 1 Ves. Sr. 341; *Powell v. Monnier*, 1 Atk. 611; *Toulmin v. Price*, 5 Ves. 235; *Mossop v. Eadon*, 16 Ves. 430; *Hansard v. Robinson*, 7 Barn. & C. 90, 9 Dowl. & R. 860.

²⁴⁶ *Byles, Bills*, 383; *Chit. Bills*, 300; 2 Pars. Notes & B. 297; *Story, Bills*, § 447. And this is true of a bank note of which one-half has been lost in the mail. *Mossop v. Eadon*, 16 Ves. 430. Or a note which has been destroyed. *Fisher v. Mershon*, 3 Bibb (Ky.) 527. Or a lost bond. *Dumas v. Powell*, 22

to bearer,²⁴⁷ or on a promise to accept a bill, which was lost after it had been discounted on the faith of the promise.²⁴⁸ A court of equity, on indemnity given by the owner, will compel the drawer to furnish a new bill,²⁴⁹ or a new coupon bond,²⁵⁰ or will enforce a lost acceptance.²⁵¹ And, where equity has once taken jurisdiction in the case of a lost note, it will not be defeated by the subsequent finding of the note.²⁵² An action will lie in equity upon a lost bill, even though there might be an action at law.²⁵³ And a bill in equity may be filed for discovery upon a lost bill, with an allegation that there is no sufficient remedy at law.²⁵⁴

But a court of equity will only take jurisdiction upon affidavit of loss and tender of indemnity.²⁵⁵ And it will not interfere to enforce bank notes which are alleged to have been destroyed by fire, but cannot be identified by number or otherwise, and are not clearly proven to be the notes of the defendant.²⁵⁶ And, where a bank note is expressly payable at a particular place, equity will not grant relief to the owner, upon its loss, until after demand made at such place.²⁵⁷ Nor will a court of equity entertain a suit against the ac-

N. C. 122. Or nonnegotiable bond. *Reeves v. Morgan*, 48 N. J. Eq. 415, 21 Atl. 1040.

²⁴⁷ *Rowley v. Ball*, 3 Cow. (N. Y.) 303; *Butler v. Joyce*, 20 D. C. 191. Or a note payable to "A. or bearer." *Adams v. Edmunds*, 55 Vt. 353.

²⁴⁸ *Savannah Nat. Bank v. Haskins*, 101 Mass. 370. And see § 1698, *supra*.

²⁴⁹ *Rhodes v. Morse*, 14 Jur. 800. Especially after the lost check is barred by the statute of limitations. *Taylor v. Scrivens*, 1 Beav. 571.

²⁵⁰ *New Orleans, J. & G. N. R. Co. v. Mississippi College*, 47 Miss. 560.

²⁵¹ *City of Bloomington v. Smith*, 123 Ind. 41, 23 N. E. 972.

²⁵² *Crawford v. Summers*, 3 J. J. Marsh. (Ky.) 301. Especially if found in adverse hands. *Force v. City of Elizabeth*, 28 N. J. Eq. 403.

²⁵³ *Davies v. Dodd*, 4 Price, 176. Although the loss was not disputed, and no discovery was asked. *Chewning v. Singleton*, 2 Hill (S. C.) 371. Equity seems, in North Carolina, to have been preferred, because the loss could be proved in equity by the plaintiff's oath, which could not be done at law. *Chancy v. Baldwin*, 46 N. C. 78. And equity is the best jurisdiction, where both are concurrent. *Davis v. Benbow*, 2 Bailey (S. C.) 427. And it is not ousted in Alabama by the statute providing for action at law on a lost bill. *Tindall v. Childress*, 2 Stew. & P. (Ala.) 250.

²⁵⁴ *Temple v. Gove*, 8 Iowa, 511. And see *Mossop v. Eaden*, 16 Ves. 430.

²⁵⁵ *Smith v. Walker*, 1 Smedes & M. Ch. (Miss.) 432.

²⁵⁶ *Irwin v. Bank*, 1 Humph. (Tenn.) 145.

²⁵⁷ *Streater v. Bank*, 55 N. C. 31.

ceptor in favor of one who intended to become an indorsee, but had not obtained the indorsement before the bill was destroyed.²⁵⁸ But, where the last indorsee of a lost bill sues the acceptor in equity, it is not necessary to make the prior indorsees parties defendant.²⁵⁹

Action at Law.

§ 1697. It is now settled in Great Britain that the owner of a negotiable bill which has been lost or destroyed cannot bring suit upon it at law.²⁶⁰ This is partly because of the difficulty in making legal proof of the bill, and partly because of the inability of the court to require indemnity. In like manner, the owner of a lost note payable to bearer cannot recover on it at law.²⁶¹ And this has been held to be so whether the bill was actually indorsed or not.²⁶² But if the bill was specially indorsed before its loss, and therefore not negotiable without further indorsement, it has been held that the owner might bring suit on it at law, and offer secondary evidence of its contents.²⁶³ If it was not indorsed when lost, an action at law

²⁵⁸ *Edge v. Bumford*, 31 Law J. Ch. 805.

²⁵⁹ *Byles, Bills*, 384; *Chit. Bills*, 301; *Macartney v. Graham*, 2 Sim. 285; *Foley v. Carlon*, *Younge*, 373. But see *West v. Patton*, *Litt. Sel. Cas.* (Ky.) 405.

²⁶⁰ *Byles, Bills*, 381; *Benj. Chalm. Dig.* art. 144; *Chit. Bills*, 307; 1 *Edw. Bills & N.* § 420; *Story, Prom. Notes*, § 108; *Hansard v. Robinson*, 7 Barn. & C. 90; 9 *Dowl. & R.* 860; *McNair v. Gilbert*, 3 *Wend.* (N. Y.) 346. But see, as to recovery on an acceptance that was destroyed by mistake after renewal by a forged acceptance, *Wright v. Maidstone*, 1 *Kay & J.* 701. And see 2 *Pars. Notes & B.* 290. So, action lies at law where a note has been destroyed, and is already barred by the statute of limitations. *Moses v. Trice*, 21 *Grat.* (Va.) 556; *Moore v. Fall*, 42 *Me.* 450. But the mere circumstance that a note was barred by the statute of limitations before it was lost will not enable the loser to sue. *Chit. Bills*, 306; *Poole v. Smith*, *Holt*, 144. But see 2 *Pars. Notes & B.* 290, 296; *Story, Bills*, § 447.

²⁶¹ *Kirby v. Slisson*, 2 *Wend.* (N. Y.) 550. Though indemnity is offered. *Pier-son v. Hutchinson*, 2 *Camp.* 211.

²⁶² *Byles, Bills*, 381; *Bevan v. Hill*, 2 *Camp.* 381; *Ramuz v. Crowe*, 1 *Exch.* 167.

²⁶³ *Chit. Bills*, 306; 1 *Edw. Bills & N.* § 427; 2 *Pars. Notes & B.* 291; *Long v. Bailie*, 2 *Camp.* 214; *Mossop v. Eadon*, 16 *Ves.* 430; *Depew v. Wheelan*, 6 *Blackf.* (Ind.) 485; *Branch Bank v. Tillman*, 12 *Ala.* 214; *Kirkwood v. Bank*, 40 *Neb.* 484, 58 *N. W.* 1016; *Id.*, 40 *Neb.* 497, 58 *N. W.* 1135; *Clark v. Snow*, 60

will still lie on the original consideration.²⁶⁴ And, if it was not negotiable, the action may be either on the bill or the consideration.²⁶⁵ But the owner of a negotiable bill which has been destroyed cannot bring suit at common law to recover the consideration.²⁶⁶ Where the defendant has wrongfully obtained possession of the bill, and withholds it from the owner, a suit may be brought upon it at law.²⁶⁷ So, if suit is brought at law on a negotiable bond or note, its accidental destruction pending the suit will not defeat the action.²⁶⁸ But if the bill is lost after action brought, and the defendant resists the action, and puts the plaintiff to his proof of the bill under the ordinary issues, he must account for its nonproduction.²⁶⁹ If, however, the bill is lost before its maturity, no action at law lies, although indemnity is offered.²⁷⁰ And it has been said to make no difference whether the bill is due or not at the time of its loss, only a court of equity having jurisdiction in either case.²⁷¹

Vt. 205, 14 Atl. 87; *Adams v. Baker*, 16 R. I. 1, 11 Atl. 168; *Bötelier v. Dexter*, 20 D. C. 26. So, where there is no evidence that it has been negotiated or indorsed. *Chaudron v. Hunt*, 3 Stew. (Ala.) 31.

²⁶⁴ *Rolt v. Watson*, 12 Moore, 510.

²⁶⁵ Byles, Bills, 382; Chit. Bills, 305; 2 Daniel, Neg. Inst. 483; 1 Edw. Bills & N. § 428; 2 Pars. Notes & B. 289; *Wain v. Bailey*, 10 Adol. & E. 616; *Price v. Price*, 16 Mees. & W. 243; *Ramuz v. Crowe*, 1 Exch. 167. And see *Rolt v. Watson*, 4 Bing. 273. So, upon a sealed note which was not indorsed by the payee. *Whitesides v. Wallace*, 2 Speer (S. C.) 192. Or on a note payable to A. B., his agent or attorney. *Templin v. Krahn*, 3 Ind. 373. So, in Mississippi, where the note is subject to equities in the indorsee's hands. *Clark v. Reed*, 12 Smedes & M. 554.

²⁶⁶ Byles, Bills, 381; Chit. Bills, 304; *Crowe v. Clay*, 9 Exch. 604; *Dangerfield v. Wilby*, 4 Esp. 159; *Champion v. Terry*, 3 Brod. & B. 295, 7 Moore, 130.

²⁶⁷ Chit. Bills, 301; 2 Pars. Notes & B. 292; *Smith v. McClure*, 5 East, 477; *Pierson v. Hutchinson*, 2 Camp. 212; 6 Esp. 126. And the suit must be for a lost note under the Tennessee statute. *Powers v. Fitzhugh*, 10 Humph. 415.

²⁶⁸ *Bliss v. Turnpike Co.*, 9 Dana (Ky.) 265. And he will not be compelled to proceed after the loss as upon a lost note. *German Sav. Bank v. Kerlin*, 53 Mo. 382.

²⁶⁹ Byles, Bills, 303, 382; *Poole v. Smith*, Holt, 144.

²⁷⁰ *Pierson v. Hutchinson*, 2 Camp. 211; 6 Esp. 126.

²⁷¹ Byles, Bills, 382; 2 Daniel, Neg. Inst. 478; *Story, Prom. Notes*, § 450; *Crowe v. Clay*, 9 Exch. 608; *Rowley v. Ball*, 3 Cow. (N. Y.) 303. So, *Moses v. Trice*, 21 Grat. (Va.) 556. But see, contra, Chit. Bills, 307; 2 Pars. Notes & B. 296; *Thayer v. King*, 15 Ohio, 242; *Mowery v. Mast*, 14 Neb. 510, 16 N.

So, where a bill payable to bearer is lost after a promise of payment by the acceptor, he will not be liable in a suit at law on such promise.²⁷²

Statutes—Law and Equity Blended.

§ 1699. In some of the United States provision is made by statute for bringing an action at law upon a lost bill or note.²⁷³ And in states having no separate courts of law and equity recovery may be had in an action at law on tender of sufficient indemnity.²⁷⁴ Thus, where a negotiable note has been indorsed in blank, and afterwards stolen, the owner may recover upon it, on giving indemnity,²⁷⁵ except as against an indorser, who would require the note itself for his protection, and reimbursement as against prior parties.²⁷⁶ A lost check is within the statute in New York, and its contents may be proved by parol.²⁷⁷ So, recovery may be had upon bank notes against the bank of issue, on proof of their destruction or loss.²⁷⁸ Or where a bank note has been cut into two parts for transmission,

W. 839. And judgment in the action will bar all further recovery. *Elliott v. Woodward*, 18 Ind. 183. And in such case it need not be shown that it had not been indorsed. *Sloo v. Roberts*, 7 Ind. 128.

²⁷² *Byles*, Bills, 382; *Chit. Bills*, 303; *Hansard v. Robinson*, 7 Barn. & C. 95; *Davis v. Dodd*, 4 Taunt. 602.

²⁷³ ALABAMA (Code, § 2597); ARKANSAS (Sand. & H. Dig. § 5610); ILLINOIS (Hurd's Rev. St. c. 98, § 14); NEW JERSEY (2 Gen. St. p. 2005, § 7); NEW YORK (Code Civ. Proc. § 1917).

²⁷⁴ *Almy v. Reed*, 10 Cush. (Mass.) 421; *Bridgeford v. Manufacturing Co.*, 34 Conn. 546. And recovery may be had on a note destroyed by fire as a lost note, on giving an indemnity bond. *McGregory v. Gregory*, 107 Mass. 543.

²⁷⁵ *Fales v. Russell*, 16 Pick. (Mass.) 315. But where it has been indorsed in blank, and lost, and afterwards assigned by the indorsee, the assignee cannot sue in his own name at law. *Willis v. Cressey*, 17 Me. 9.

²⁷⁶ *Tuttle v. Standish*, 4 Allen (Mass.) 481. Nor is such indorser liable on the original consideration. *Champion v. Terry*, 3 Brod. & B. 295. But in Tennessee the statute provides for suit against the indorser of a lost note. *Union Bank v. Osborne*, 6 Humph. (Tenn.) 318.

²⁷⁷ *Jacks v. Darrin*, 3 E. D. Smith, 548.

²⁷⁸ Whether destroyed, *Bank of Louisville v. Summers*, 14 B. Mon. (Ky.) 306; or lost, *Commercial Bank v. Benedict*, 18 B. Mon. (Ky.) 307. But not under the statute, in ALABAMA (Code, § 2597).

and one half is lost, inasmuch as it is no longer negotiable, recovery may be had on the other half.²⁷⁹

Loss—How Pleaded.

§ 1700. Where an action is brought on a note that has been lost or destroyed in whole or part, it is not necessary to declare upon it specially, but the plaintiff must account for the loss before he can offer secondary evidence of its contents.²⁸⁰ And he cannot recover on a lost note, on the money counts, without proof that it has been lost or destroyed, and is therefore not capable of being the object of a further suit.²⁸¹ Where the loss is averred by the plaintiff to excuse its nonproduction, the defendant may take issue upon the fact of loss.²⁸² And, if the note is not specially declared on as lost, the loss must now be set up in Great Britain by plea, or the plaintiff may recover on secondary evidence on proof of the loss.²⁸³ In some states a complaint is demurrable unless it contains an affidavit of the owner stating the fact of the loss.²⁸⁴ But pleading to the merits of the action is a waiver of such affidavit after verdict.²⁸⁵

Evidence of Loss—Affidavit.

§ 1701. In order to give the court jurisdiction in an action upon a lost bill, the plaintiff must prove its former existence.²⁸⁶ But, if

²⁷⁹ *Bank of U. S. v. Sill*, 5 Conn. 106. And the whole amount may be recovered on the common counts. *Union Bank v. Warren*, 4 Sneed (Tenn.) 167.

²⁸⁰ *Vanauken v. Hornbeck*, 14 N. J. Law, 178; *Adams v. Baker*, 16 R. I. 1, 11 Atl. 168. And the declaration need not show whether the bill was due or indorsed before it was lost. *Chaudron v. Hunt*, 3 Stew. (Ala.) 31.

²⁸¹ *Dangerfield v. Wilby*, 4 Esp. 159.

²⁸² *Campbell v. McCrea*, 11 U. C. Q. B. 93.

²⁸³ *Byles, Bills*, 382; *Blackie v. Pidding*, 6 C. B. 196; *Charnley v. Grundy*, 14 C. B. 608.

²⁸⁴ *Bell v. Moore*, 9 Ala. 823; *Rowland v. Dally*, 45 Ga. 129; *Carter v. Vaulx*, 2 Swan (Tenn.) 639.

²⁸⁵ *Union Bank v. Osborne*, 6 Humph. (Tenn.) 318.

²⁸⁶ *Enston v. Friday*, 2 Rich. Law (S. C.) 427; and execution, *Jackson v. Jackson*, 6 Dana (Ky.) 257; and also (it has been held) that it was not paid, *Usher v. Galther*, 2 Har. & McH. (Md.) 457. But see, contra, 2 Pars. Notes & B. 307. Proof of its destruction will make strict proof of its execution un-

the bill is afterwards found pending the suit, it may be proved in the usual manner.²⁸⁷ Preparatory to the admission of secondary evidence of its contents, it must be proved that this bill has been lost or destroyed,²⁸⁸ especially where the suit is on a certificate of deposit payable "on return of this certificate."²⁸⁹ The question of evidence was once considered as determining that of jurisdiction. Thus, it was held at one time that on proof of the destruction of a bill, whether negotiable or not, its contents might be proved in a court of law by secondary evidence; but this has been overruled on the ground that a court of law cannot afford full relief or entertain jurisdiction in such case.²⁹⁰

Where the loss is denied by the plea, it must in all cases be proved by competent evidence.²⁹¹ Such proof may be made by the plaintiff's attorney in whose hands the paper was placed for suit before it was lost,²⁹² or by the holder of a lost note, although himself a party in interest, and as such not in general a competent witness.²⁹³

necessary, *Bradley v. Long*, 2 Strob. (S. C.) 160; or of the signature of a bank officer on the missing part of a bank note, *Murdock v. Bank*, 2 Rob. (La.) 112. But, if shown to be still in existence, no recovery can be had on it as a lost bill. *Stout v. Ashton*, 5 T. B. Mon. (Ky.) 251.

²⁸⁷ *Carlisle v. Davis*, 7 Ala. 42; *Drake v. Ramey*, 3 Rich. Law (S. C.) 37; *Jones v. Fales*, 5 Mass. 101.

²⁸⁸ *Aborn v. Bosworth*, 1 R. I. 401; *Vanauken v. Hornbeck*, 14 N. J. Law, 178; *Usher v. Galthier*, 2 Har. & McH. (Md.) 457; *Lewis v. Splane*, 2 La. Ann. 754; *Enston v. Friday*, 2 Rich. Law (S. C.) 427; *Bank of Louisville v. Summers*, 14 B. Mon. (Ky.) 306. So, in West Virginia, if the loss is denied. *Exchange Bank v. Morrall*, 16 W. Va. 546. Proof of destruction is sufficient. *Hagerstown Bank v. Adams Exp. Co.*, 45 Pa. St. 419. But the holder is not required to prove its absolute destruction. *Swift v. Stevens*, 8 Conn. 431.

²⁸⁹ *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320; or where the action is upon a promise waiving laches in notice of dishonor of the bill, *Powell v. Roach*, 6 Esp. 76.

²⁹⁰ *Bytes, Bills*, 281; *Chft. Bills*, 305; *Woodford v. Whitely, Moody & M.* 517; *Pierson v. Hutchinson*, 2 Camp. 211, 6 Esp. 126.

²⁹¹ *Exchange Bank v. Morrall*, 16 W. Va. 546. This could not be formerly by the plaintiff or other interested witness, either at law, *Cotton v. Beasley*, 6 N. C. 250; *Davis v. Benbow*, 2 Bailey (S. C.) 427; or in equity, *Wardlaw v. Gray*, Dud. Eq. (S. C.) 85.

²⁹² *Glover v. Thompson*, Ryan & M. 403. And the attorney's clerk, to whom it appears by other proof that the note was sent, is a necessary witness as to the loss and search made. *Grover v. Clark*, 5 U. C. Q. B. (O. S.) 208.

²⁹³ *Chamberlain v. Gorham*, 20 Johns. (N. Y.) 144.

Preliminary proof, at least, may be made by the affidavit of a party to the suit.²⁹⁴ So, in equity, by an affidavit of loss annexed to the bill of complaint, although this is not sufficient evidence, if the loss is denied.²⁹⁵ In Alabama it is provided by statute that the plaintiff's affidavit shall be presumptive evidence of the loss and of the contents of the paper, until denied by the defendant upon his affidavit.²⁹⁶ And suit will not lie on a lost bill indorsed in blank without such affidavit, although the bill is drawn in two parts, and only the protested part is lost.²⁹⁷ Where a copy is offered in evidence, diligent search must appear, and the affidavit must show the particulars.²⁹⁸ But it is not necessary that it should state that the bill was lost by accident.²⁹⁹

§ 1702. — Whether the evidence of the loss is legally sufficient to allow the plaintiff to prove the contents of the bill is a question for the court to determine.³⁰⁰ But the nonproduction of the original must be explained to the satisfaction of the jury.³⁰¹ The evidence both as to the loss and the contents of the lost bill goes to the jury.³⁰² And circumstantial evidence of the loss, which satisfies the jury of the fact, is sufficient.³⁰³ Thus, it has been held sufficient for a witness to show that the note must be among his papers, if it is

²⁹⁴ *Donelson v. Taylor*, 8 Pick. (Mass.) 389; 2 Daniel, Neg. Inst. 475; *Cleveland v. Worrell*, 13 Ind. 545; *Wade v. Wade*, 12 Ill. 89; *Meeker v. Jackson*, 3 Yeates (Pa.) 442. Even where his testimony is not admissible on trial of the action. *Dormady v. Bank*, 3 Ill. 236.

²⁹⁵ *Fisher v. Carroll*, 41 N. C. 485; *Cockell v. Bridgeman*, 4 Beav. 499. And it has been held sufficient both to give jurisdiction and let in secondary evidence, in *Hill v. Lackey*, 9 Dana (Ky.) 82. Although this latter purpose has been denied, as well as its sufficiency to prove that the note had not been negotiated. *Grant v. Reid*, 46 N. C. 512.

²⁹⁶ ALABAMA (Code, § 2597).

²⁹⁷ *Posey v. Bank*, 12 Ala. 802.

²⁹⁸ *Palmer v. Logan*, 4 Ill. 56.

²⁹⁹ *Harryman v. Robertson*, 3 Mo. 449.

³⁰⁰ *Page v. Page*, 15 Pick. (Mass.) 368; *Donelson v. Taylor*, 8 Pick. (Mass.) 390; *Boyle v. Arledge*, Hempst. 620, Fed. Cas. No. 1,758.

³⁰¹ *Bowman v. Smith*, 1 Strob. (S. C.) 246.

³⁰² *Peabody v. Denton*, 2 Gall. 351, Fed. Cas. No. 10,867.

³⁰³ Chit. Bills, 297; 2 Daniel, Neg. Inst. 474; *Holiday v. Sigll*, 2 Car. & P. 176; *Nagel v. Mignot*, 8 Mart. O. S. (La.) 488; without evidence of how he lost it, *Down v. Halling*, 4 Barn. & C. 330; or production of the published notice of loss, *Miller v. Webb*, 8 La. 516.

not lost, and that he has made diligent and unsuccessful search for it;³⁰⁴ or that the note was placed for collection in the hands of an attorney who has died, and that diligent search has been made for it in vain;³⁰⁵ or to produce a duplicate letter, with a notarial copy of the bill, reciting that it was mailed with the bill by a certain ship, together with proof that the ship's mail was thrown overboard on its being chased by a privateer.³⁰⁶ But it is not sufficient to prove that the note was mailed to a postmaster in another state, in order to procure evidence of its execution, and was never returned to the owner.³⁰⁷ And it has even been held not to be sufficient for a recovery on half a bank note to prove that the other half had been mailed, and stolen from the mail.³⁰⁸

The production of a bill may be dispensed with by an admission on the defendant's part that a certain amount was due on it,³⁰⁹ or even, it has been held, by an acknowledgment that he drew the

³⁰⁴ *Fremont v. U. S.*, 4 Ct. Cl. 252; or to prove the loss of the pocketbook containing the lost note, *Higgins v. Watson*, 1 Mich. 428. But an unsuccessful search "at home" is not of itself sufficient. *Crowe v. Capwell*, 47 Iowa, 426.

³⁰⁵ *Patriotic Bank v. Little*, 2 Cranch, C. C. 627, Fed. Cas. No. 10,809; especially where the attorney had been massacred and his papers destroyed, *Vuyton v. Brenell*, 1 Wash. C. C. 469, Fed. Cas. No. 17,026; or where the court files, in which the note should have been found, were abstracted, *Hernndon v. Glivens*, 16 Ala. 261. But it is not enough to show that it was left with a referee, and that subsequent inquiry was made of him unsuccessfully, without search in the court files which contained his report. *Rogers v. Durant*, 106 U. S. 644, 1 Sup. Ct. 623.

³⁰⁶ *Anderson v. Robson*, 2 Bay (S. C.) 495.

³⁰⁷ *Depew v. Wheelan*, 6 Blackf. (Ind.) 485.

³⁰⁸ *Byles, Bills*, 383; *Mayor v. Johnson*, 3 Camp. 324. But such half note comes within the provisions of the English Common Law Procedure act of 1854, as a lost note. *Redmayne v. Burton*, 9 Jur. (N. S.) 21; *Smith v. Mundy*, 6 Jur. (N. S.) 977.

³⁰⁹ *Freyer v. Brown*, Ryan & M. 145. So, his admissions as to its existence and amount, *Latapie v. Gravier*, 8 Mart. O. S. (La.) 316. So, an admission of the loss in an answer in chancery is sufficient, *Charnley v. Grundy*, 14 C. B. 608. But it is not enough that he had apologized for not paying it. *Dangerfield v. Wilby*, 4 Esp. 159. So, a mere list of bank notes in the handwriting of the alleged deceased owner, with unexplained marks opposite the numbers sued upon, but without evidence of their having been lost or having been in such owner's possession at his death, is insufficient. *Glynn v. Bank*, 2 Ves. Sr. 38.

bill.³¹⁰ But it is not enough to show that the plaintiff had informed the deceased maker of the loss of the note, and had demanded another.³¹¹

Evidence of Contents.

§ 1703. Upon proof of the destruction of a bill, its contents may be proved by parol evidence.³¹² So, where it is clearly shown to have been mislaid or lost without fraud on the holder's part.³¹³ But, where a bill is lost after acceptance and protest, the proof of contents, in order to hold the drawer, must be sufficient to hold the acceptor also.³¹⁴ Where a note is lost after the commencement of the suit, its contents may be proved, in like manner, by parol evidence,³¹⁵ after proof, as in other cases, of loss and diligence.³¹⁶ The plaintiff should not only prove the contents of a lost note, but his own title to it, by indorsement or other transfer.³¹⁷ It will, however, be presumed that the lost instrument was duly stamped.³¹⁸ And, in the absence of other evidence, it will be presumed that it was payable on demand.³¹⁹ But there is no presumption that it was negotiable,³²⁰ especially if it is in the possession of the defendant,

³¹⁰ *Hart v. King*, 12 Mod. 310.

³¹¹ *White v. Brown*, 19 Conn. 577.

³¹² *Blackie v. Pidding*, 6 C. B. 196. So, where it is torn and partly destroyed. *Dean v. Speakman*, 7 Blackf. (Ind.) 317.

³¹³ *Renner v. Bank*, 9 Wheat. 581; *Pintard v. Tackington*, 10 Johns. (N. Y.) 104; *Foster v. Mackay*, 7 Metc. (Mass.) 531; *Littler v. Franklin*, 9 Ind. 216; *Jernigan v. Carter*, 60 Ga. 131. So, by statute, in MARYLAND (Pub. Gen. Laws, art. 13, § 11); MICHIGAN (How. Ann. St. § 7518); MINNESOTA (Gen. St. § 5736).

³¹⁴ *Bond v. Whitfield*, 32 Ga. 215.

³¹⁵ *Weston v. Hight*, 17 Me. 287; *Abbott v. Striblen*, 6 Iowa, 191. So, where an acceptance is lost after presentment to the committee of the bankrupt acceptor. *Pooley v. Millard*, 1 Crompt. & J. 411.

³¹⁶ *Viles v. Moulton*, 11 Vt. 470.

³¹⁷ *Bean v. Keen*, 7 Blackf. (Ind.) 152. So, to recover on a half bank note, proof of ownership is necessary. *Farmers' Bank v. Reynolds*, 4 Rand. (Va.) 186.

³¹⁸ *Byles, Bills*, 385; *Marine Inv. Co. v. Havilsde*, L. R. 5 H. L. 625.

³¹⁹ *Tucker v. Tucker*, 119 Mass. 79.

³²⁰ *Blade v. Noland*, 12 Wend. (N. Y.) 173; *McNair v. Gilbert*, 3 Wend. (2418)

or has been destroyed by him.³²¹ And, to bring a lost note or bill within a statute which applies only to negotiable paper, its negotiable character must be shown affirmatively.³²²

(N. Y.) 246; *Yingling v. Kohlhass*, 18 Md. 148; although indorsed in blank, *Hough v. Barton*, 20 Vt. 455.

³²¹ *Wright v. Wright*, 54 N. Y. 437, affirming 59 Barb. 505.

³²² 1 Edw. Bills & N. § 421.

III. INTEREST, EXCHANGE, AND DAMAGES.

- § 1704. Interest—General Principles.
- 1705. — Action for.
- 1706. — Compound.
- 1707. — What Law Governs.
- 1708. — Reckoned from Date.
- 1709. — Reckoned from Maturity.
- 1710. — On Demand Notes.
- 1711. — Until Tender—Bankruptcy.
- 1712. — After Maturity.
- 1713. — After Maturity—Expressed.
- 1714. Exchange and Re-exchange.
- 1716. Notarial Fees.
- 1717. Commissions—Attorney's Fees.
- 1718. Costs of Other Suit.
- 1719. Damages on Protest—What Law Governs.
- 1720. — Statutory.
- 1721. — Recovery by Whom.
- 1722. — Recovery against Whom.
- 1723. — When Recoverable.
- 1724. — On Protest.
- 1725. — Waiver of.
- 1726. — Measure of.
- 1727. — Costs Recoverable.
- 1728. — Against Surety—Guarantor.
- 1729. — Recovery by Indorser.
- 1730. — Partial Dividends.
- 1731. — Recovery by Pledgee.
- 1732. — In Trover—For Negligence.
- 1733. — In What Currency.
- 1734. — Notes Payable in Property.
- 1735. Confederate "Scaling Acts."

Interest—General Principles.

§ 1704. Interest from the time of maturity is generally allowed on commercial paper by the usage of trade, although a jury is not bound to give more than nominal interest as damages.²²² But,

²²² Byles, Bills, 309; Benj. Chalm. Dig. art. 213; Chit. Bills, 759; 2 Pars. Notes & B. 396; Keene v. Keene, 3 C. B. (N. S.) 144. Where the contract does not call for interest, it is a question for the jury whether the party is entitled to it, and at what rate. Gibbs v. Fremont, 9 Exch. 25.

if a note bears interest by its terms, the verdict must be for the interest as well as the principal.³²⁴ In Great Britain interest may now be recovered, by statute, on all written instruments payable at a time certain, and on all other debts after written demand, and notice that interest will be claimed.³²⁵ If the interest is expressly provided for in the instrument, it is part of the debt, but otherwise it is only recoverable as damages for the detention of the debt.³²⁶ Where the interest is deducted in advance, it is designated as "discount."³²⁷

In the absence of usury laws, the rate of interest will be fixed by the agreement of the parties, however exorbitant that may be.³²⁸ But, if the agreement is to pay a certain rate of interest on a certain contingency, the happening of the contingency will determine the

³²⁴ *Smith v. Keels*, 15 Rich. Law (S. C.) 318; and it may be allowed by the court, although the verdict is irregular, *Allen v. Reilly*, 15 Nev. 452. So, if a judgment by default is entered for too little interest, the mistake may be corrected for the plaintiff on a writ of error brought by the defendant, *Pridgen v. Bonner*, 28 Tex. 799; and the interest is to be reckoned in the same currency as the principal, *Holt v. Gliven*, 43 Ala. 612.

³²⁵ 3 & 4 Wm. IV. c. 42, §§ 28, 29; *Duncombe v. Brighton Club*, L. R. 10 Q. B. 371. But a nonnegotiable note payable "one month after my arrival in England" will not draw interest. *Page v. Newman*, 9 Barn. & C. 378.

³²⁶ *Byles*, Bills, 308; *Chit. Bills*, 760; *Watkins v. Morgan*, 6 Car. & P. 661; *Hudson v. Fawcett*, 7 Man. & G. 348; *Cameron v. Smith*, 2 Barn. & Ald. 305. 5 Taunt. 626; *In re Burgess*, 2 Moore, 745, 8 Taunt. 660; *Crouse v. Park*, 3 U. C. Q. B. 458. In the absence of any statute, damages are recoverable as proved. *Perry v. Taylor*, 1 Utah, 63.

³²⁷ *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Niagara Co. Bank v. Baker*, 15 Ohio St. 68; *Pape v. Bank*, 20 Kan. 440. But, where a note is payable without interest, interest will not be allowed on part payments made before maturity, without an agreement to that effect, *Parker v. Moody*, 58 Me. 70.

³²⁸ *Young v. Fluke*, 15 U. C. C. P. 360. But an agreement to pay 4 per cent. per month for one year, and privilege of a second year at the same rate until the end of two years, will not cover the second year, where no payment or arrangement is made, and the payee has not elected to keep the money two years. *Chapin v. Murphy*, 5 Minn. 474 (Gil. 383). The rate agreed on need not be expressed in the note. *Davey v. Bank* (S. D.) 72 N. W. 83. But the figures "10%" after the amount have been held not to be capable of explanation by parol as an interest clause, and the note has been left to bear the legal 6 per cent. *Griffith v. Furry*, 30 Ill. 251.

right to recover the interest.³²⁹ In some states the statute fixes one rate of interest as lawful in the absence of agreement, and another as "conventional interest," allowable in case of express agreement.³³⁰

Action for Interest.

§ 1705. An action may be brought for interest that has become due, although the principal is not yet due.³³¹ If the note is payable in installments, with interest, the interest on each installment becomes due with that installment.³³² But an action cannot be brought for the interest separately, if the principal is also due.³³³ Although, if another bill is given upon the maturity of an overdue bill, and the original is retained expressly for the arrears of interest not covered by the new bill, an action may be brought upon it after the new bill is paid, and the principal thus discharged.³³⁴ Interest may be recovered upon the common count without any special averment.³³⁵ The acceptor of a bill, as well as the maker of a note,³³⁶ and the drawer and indorser, are all liable for interest.³³⁷ The drawers and

³²⁹ *Daniel v. Henry*, 30 Tex. 26.

³³⁰ Thus, in KENTUCKY, interest may be stipulated for in writing, up to 10 per cent., but otherwise only 6 per cent. is allowed. Ky. St. § 2218. And see § 521, *supra*.

³³¹ *Cooley v. Rose*, 3 Mass. 221.

³³² *Saunders v. McCarthy*, 8 Allen (Mass.) 42; *Ewer v. Myrick*, 1 Cush. (Mass.) 16; *Bander v. Bander*, 7 Barb. (N. Y.) 560.

³³³ *Johnston v. Brannan*, 5 Johns. (N. Y.) 268; *Howe v. Bradley*, 19 Me. 31; and *paid*, *Stevens v. Barringer*, 13 Wend. (N. Y.) 639; *Moore v. Fuller*, 47 N. C. 205. But see *Byles, Bills*, 311; *Laing v. Stone*, *Moody & M.* 229, note, 2 *Man. & R.* 561.

³³⁴ *Byles, Bills*, 311; *Lumley v. Musgrave*, 4 Bing. N. C. 9, 5 Scott, 230.

³³⁵ *Nordenstrom v. Pitt*, 13 Mees. & W. 723; *Mills v. Bank*, 11 Wheat. 431; *Morrison v. Keese*, 25 Tex. Supp. 154; *Wernwag v. Mothershead*, 3 Blackf. (Ind.) 401; *Washington v. Bank*, 1 How. (Miss.) 230; *Chinn v. Hamilton*, 1 Hemp. 438, Fed. Cas. No. 2,685. So, in an action of trover, interest may be included without special averment in the declaration. *Paine v. Pritchard*, 2 Car. & P. 558; 3 & 4 Wm. IV. c. 42, § 29.

³³⁶ *Chit. Bills*, 760; 2 *Pars. Notes & B.* 399. But, where the acceptor is entitled to have the bill presented for payment at a particular place, he is not liable for interest without proof of such presentment. *Phillips v. Franklin*, *Gow*, 196.

³³⁷ *Chit. Bills*, 760; *Cameron v. Smith*, 2 *Barn. & Ald.* 305. And see § 742,

indorsers of a bill are liable for interest without formal protest;³³⁸ but only from notice of dishonor, where they are entitled to such notice.³³⁹ But, if a note bears interest payable annually, an indorser will be liable for principal and interest after the principal becomes due, without any demand previously made for the annual interest, or notice of its nonpayment.³⁴⁰ Interest may also be recovered against one who guaranties the payment of a bill.³⁴¹ And one maker will be liable for the rate of interest expressed, although a lower rate has been recovered against his co-maker.³⁴²

It has been held that war suspends the running of interest between debtor and creditor who are alien enemies.³⁴³

Compound Interest.

§ 1706. Compound interest may be allowed where it is consistent with the course of dealing between the parties.³⁴⁴ But it is not recoverable simply by reason of the stipulation for annual interest payments.³⁴⁵ In general, an agreement cannot be made in advance

supra. So, the drawer of a memorandum check for borrowed money. *Glover v. Graesser*, 10 Rich. Eq. (S. C.) 441.

³³⁸ *Windle v. Andrews*, 2 Barn. & Ald. 696.

³³⁹ *Byles, Bills*, 310; *Chit. Bills*, 763; 2 Pars. Notes & B. 399; *Walker v. Barnes*, 5 Taunt. 240, 1 Marsh. 36.

³⁴⁰ *Howe v. Bradley*, 19 Me. 31.

³⁴¹ *Byles, Bills*, 311; *Ackermann v. Ehrensperger*, 16 Mees. & W. 99. But a promise by a third party to pay interest on a note is not a promise to pay the principal. *Home Sav. Bank v. Mackintosh*, 131 Mass. 489.

³⁴² *Chafoln v. Rich*, 92 Cal. 471, 28 Pac. 488.

³⁴³ *Brown v. Hiatts*, 15 Wall. 177; *Id.*, 1 Dill. 372, Fed. Cas. No. 2,011; *Conn v. Penn*, Pet. C. C. 496, Fed. Cas. No. 3,104; *Brewer v. Hastie*, 3 Call (Va.) 22; *Mayer v. Reed*, 37 Ga. 482; *Hoare v. Allen*, 2 Dall. (Pa.) 102. But see, contra, *Shortridge v. Macon*, Chase, 136, Fed. Cas. No. 12,812; *Paul v. Christie*, 4 Har. & McH. (Md.) 161; *Neillson v. Rutlege*, 1 De Saus. Eq. (S. C.) 194; *Griffith v. Lovell*, 26 Iowa, 226; *Spencer v. Brower*, 32 Tex. 663. Especially where the parties are in the same county, *Gates v. Bank*, 12 Helsk. (Tenn.) 325; *Yeaton v. Berney*, 62 Ill. 61; or are represented there by an authorized agent, *Denniston v. Imbrie*, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; *Ward v. Smith*, 7 Wall. 447.

³⁴⁴ *Chit. Bills*, 761; *Bruce v. Hunter*, 3 Camp. 467; 5 Barn. & Ald. 34. But not without express agreement in WISCONSIN (*Sanb. & B. Ann. St. § 1689*).

³⁴⁵ *Ferry v. Ferry*, 2 Cush. (Mass.) 92; *Hastings v. Wiswall*, 8 Mass. 455; *Doe v. Warren*, 7 Me. 48. But see, contra, *Anketel v. Converse*, 17 Ohio St. 11;

for compound interest.³⁴⁶ But a new note or other contract may be made for interest on arrears of interest without usury.³⁴⁷ And interest coupons draw interest from their maturity.³⁴⁸ Where no pay-

Catlin v. Lyman, 16 Vt. 144; *Wheaton v. Pike*, 9 R. I. 132; *Bledsoe v. Nixon*, 69 N. C. 89; *Knight v. Braswell*, 70 N. C. 709. But only if so expressed. *Rix v. Strauts*, 59 Mich. 364, 26 N. W. 638.

³⁴⁶ *Catlin v. Lyman*, 16 Vt. 44; *Stewart v. Petree*, 55 N. Y. 621; *Perkins v. Coleman*, 51 Miss. 298; *Hochmark v. Richler*, 16 Colo. 263, 26 Pac. 818; *Bowman v. Neely*, 137 Ill. 443, 27 N. E. 758. But see, contra, *Calhoun v. Marshall*, 61 Ga. 275; *Zulkey v. Haney*, 63 Wis. 464, 23 N. W. 577. So, by statute in CALIFORNIA, but not higher than the rate reserved on the principal. Civ. Code, § 1919; *Finger v. McCaughey*, 114 Cal. 64, 45 Pac. 1004. And agreement for a higher rate is invalid. *Yndart v. Den*, 116 Cal. 533, 48 Pac. 618. And in GEORGIA, where the interest matured, it could be sued upon before the maturity of the principal. *Calhoun v. Marshall*, 61 Ga. 275.

³⁴⁷ *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Jasper Co. v. Tarvis*, 76 Mo. 13. So, by statute in MINNESOTA. Gen. St. § 2212. And such note is not usurious. *Stewart v. Petree*, 55 N. Y. 621.

³⁴⁸ *Aurora City v. West*, 7 Wall. 82; *Scotland Co. v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26; *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 808; *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 9; *North Pennsylvania R. Co. v. Adams*, 54 Pa. St. 94; *Mills v. Jefferson*, 20 Wis. 50; *City of Jeffersonville v. Patterson*, 26 Ind. 15; *Walnut v. Wade*, 103 U. S. 683; *Philadelphia & R. R. Co. v. Smith*, 105 Pa. St. 195; *Langston v. Railroad Co.*, 2 S. C. 248; *New England Mortg. Co. v. Vader*, 28 Fed. 265 (Pub. Laws Or. p. 17); *Fox v. Railroad Co. (Conn.)* 38 Atl. 871; *Jefferson Co. v. Hawkins*, 23 Fla. 223, 2 South. 362; *Holbrook v. Sims*, 39 Minn. 122, 39 N. W. 74, 140; *Town Council of Lexington v. Union Nat. Bank*, 75 Miss. 1, 22 South. 291; *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 9; *Philadelphia & R. R. Co. v. Knight*, 124 Pa. St. 58, 16 Atl. 492. Although expressly reserved in the coupon. *Stickney v. Moore*, 108 Ala. 590, 19 South. 76. But only at legal rate of interest. *Holbrook v. Sims*, *supra*. But see *City of Pekin v. Reynolds*, 31 Ill. 529; *United States Mortg. Co. v. Sperry*, 26 Fed. 727. Such interest, it is held, cannot be recovered in the hands of the holder of the bond, to which it belongs. *Buffalo Loan, Trust & Safe-Deposit Co. v. Medina Gas & Electric Light Co.*, 12 App. Div. 199, 42 N. Y. Supp. 781. And interest expressly reserved on the coupons is usury in Idaho, Rev. St. § 1286; *Vermont Loan & Trust Co. v. Hoffman*, 49 Pac. 314; but can be recovered in Nebraska up to the maximum statutory rate, *Lewis Inv. Co. v. Boyd*, 48 Neb. 604, 67 N. W. 456. In California interest is not recoverable on coupons on state bonds until the act of 1893, *Molineux v. State*, 109 Cal. 378, 42 Pac. 34; nor on bonds which are to be made out of a statutory fund providing only for annual interest, *Davis v. City of Sacramento*, 82 Cal. 562, 22 Pac. 1118;

ments have been made on a note, the interest is to be calculated without making any rest.³⁴⁹ So, where the payments made are less than the amount of interest then due.³⁵⁰ But if a note is payable in installments, "with interest to be paid annually," and suit is brought for the interest before the principal is due, it may be recovered, with compound interest.³⁵¹

What Law Governs Interest.

§ 1707. Interest is to be reckoned at the rate fixed by the law in force at the time of making the instrument, and not at its maturity or at the beginning of the suit,³⁵² although the rate may have been reduced by subsequent statute.³⁵³ But a general statute as to the rate of interest will not be applied to a banking corporation whose rate is fixed by its own charter.³⁵⁴ And a statute reducing the legal rate will not affect a demand note previously made, with interest at a higher rate, payable semiannually, if it was intended in fact to run for several years.³⁵⁵ But an agreement for a high rate of interest for the year's forbearance will be construed to continue only for one year, where the rate was subsequently reduced by law.³⁵⁶ And a mere parol agreement by the maker for higher interest than that re-

nor in Washington on city warrants, *Portland Sav. Bank v. City of Montesano*, 14 Wash. 570, 45 Pac. 158.

³⁴⁹ Either at the commencement of the action, *Folsom v. Plumer*, 43 N. H. 469; or, if reckoned from date, at maturity, *Barker v. International Bank of Chicago*, 80 Ill. 96. But in North Carolina compound interest is chargeable with annual rests on a note made to a guardian. *Little v. Anderson*, 71 N. C. 190.

³⁵⁰ *Townsend v. Riley*, 46 N. H. 300; *Perry v. Taylor*, 1 Utah, 63.

³⁵¹ *Bannister v. Roberts*, 35 Me. 75. And in other states interest is allowed on interest made payable annually or semiannually. *Cook v. Courtright*, 40 Ohio St. 248; *Angel v. Miller*, 90 Tex. 505, 39 S. W. 916. But only at the legal rate, although a higher rate is reserved. *Angel v. Miller*, *supra*.

³⁵² *Lee v. Davis*, 1 A. K. Marsh. (Ky.) 397. And a statute fixing the rate of interest "from and after Sept. 1" does not apply to a note made on that day. *Handley v. Cunningham's Trustee*, 12 Bush (Ky.) 401. As to the rates of interest allowed in the United States, see § 521, *supra*.

³⁵³ *Besser v. Hawthorn*, 3 Or. 129.

³⁵⁴ *Shunk v. Bank*, 22 Ohio St. 508.

³⁵⁵ *Seymour v. Insurance Co.*, 44 Conn. 300.

³⁵⁶ *Mueller v. McGregor*, 28 Ohio St. 265.

served in the note cannot be shown in an action upon the note.³⁵⁷

The rate of interest is to be determined by the law of the place of contract,³⁵⁸ even where the note is secured by a mortgage on land lying in another state.³⁵⁹ And, if no interest is given before judgment by the usage of the place where the note was made, none will be allowed.³⁶⁰ If another place of payment is named in the instrument, the rate of the latter place is, in general, the one governing the maker of the note, since he promises to pay at that place.³⁶¹ But the drawer's and indorser's contract is to pay generally, if the bill is not accepted or paid by the acceptor or maker, and the rate of the place of drawing or indorsing is therefore to govern them.³⁶² Where the rate of a foreign place of payment governs, it must be proved,³⁶³ or the recovery will be at the rate established by the *lex fori*.³⁶⁴

³⁵⁷ *Hunt's Ex'r v. Hall*, 37 Ala. 702.

³⁵⁸ *Lanusse v. Barker*, 3 Wheat. 101; *Cowqua v. Lauderbrun*, 1 Wash. C. C. 521, Fed. Cas. No. 3,299; *Jaffray v. Dennis*, 2 Wash. C. C. 253, Fed. Cas. No. 7,171; *Davis v. Coleman*, 29 N. C. 424; *Lewis v. Ingersoll*, *40 N. Y. 347, 3 Abb. Dec. (N. Y.) 55; *Winthrop v. Pepon*, 1 Bay (S. C.) 468. So, as against the place where it is afterwards negotiated. *Ex parte Heidelback*, 2 Low. 526, Fed. Cas. No. 6,322. And the place of contract is generally indicated by the date. *Hopkins v. Miller*, 17 N. J. Law, 185. And see § 81, *supra*. But a memorandum on a bill, drawn in Georgia, and accepted in South Carolina, to the effect that it was a South Carolina contract, is sufficient to sustain a recovery of interest at the South Carolina rate. *Boyce v. Edwards*, 4 Pet. 111.

³⁵⁹ *Chase v. Dow*, 47 N. H. 405.

³⁶⁰ *Courtois v. Carpentier*, 1 Wash. C. C. 376, Fed. Cas. No. 3,286.

³⁶¹ 2 *Edw. Bills & N.* § 1009; *Story, Bills*, § 399; *Bodily v. Bellamy*, 2 Burrows, 1094; *Scofield v. Day*, 20 Johns. (N. Y.) 102; *Hawley v. Sloo*, 12 La. Ann. 815; *Howard v. Branner*, 23 La. Ann. 369; *Peck v. Mayo*, 14 Vt. 33; *Austin v. Imus*, 23 Vt. 286; *Swett v. Dodge*, 4 Smedes & M. (Miss.) 667; *Summers v. Mills*, 21 Tex. 77. Although payable in British sterling. *Bushby v. Camac*, 4 Wash. C. C. 296, Fed. Cas. No. 2,226. So, as against the acceptor. *Cooper v. Waldegrave*, 2 Beav. 282; *Foden v. Sharp*, 4 Johns. (N. Y.) 183. So, in an action for money paid at the defendant's request in taking up a bill. *Burton v. Anderson*, 1 Tex. 93.

³⁶² *Gibbs v. Fremont*, 9 Exch. 25; *Lanusse v. Barker*, 3 Wheat. 101; *Crawford v. Bank*, 6 Ala. 12.

³⁶³ *Swett v. Dodge*, 4 Smedes & M. (Miss.) 667; *Peacock v. Banks*, Minor (Ala.) 387; *Dunn v. Clement*, 2 Ala. 392; *Dickinson v. Bank*, 12 Ala. 54.

³⁶⁴ *Wood v. Corl*, 4 Metc. (Mass.) 203; *Wheeler v. Pope*, 5 Tex. 202. And see *Griffin v. Judson*, 12 U. C. C. P. 430. See, also, § 1712, *infra*.

Interest Reckoned from Date.

§ 1708. When a bill is payable at a certain period after date, and bears interest by its terms, it will be reckoned from date, in the absence of words showing a different intention.³⁶⁵ But if a note is made payable "with 10 per cent. interest after maturity," and the note is changed to 6 per cent. by erasure and interlineation, it will draw interest at that rate from maturity, as originally provided and not erased.³⁶⁶ And if a note is made payable in installments, the whole to become due on default in any installment, the entire balance will bear interest from the default.³⁶⁷ Where it is stipulated that the note shall draw interest "if not paid at maturity," it will be reckoned from the date of the note.³⁶⁸ And where a note is made payable at a certain time, "with interest from date," if not punctually paid, such interest will be recoverable in case of default,³⁶⁹ but not if the note

³⁶⁵ Byles, Bills, 309; Benj. Chalm. Dig. art. 13; Chit. Bills, 759; 2 Pars. Notes & B. 393; Kennerly v. Nash, 1 Starkie, 452; Doman v. Dibden, 1 Ryan & M. 381; Richards v. Richards, 2 Barn. & Adol. 447; Dewey v. Bowman, 8 Cal. 145; Gholson v. King, 79 N. C. 162; Green v. Kennedy, 6 Mo. App. 577; Kimmell v. Burns, 84 Ind. 370; Kilgore v. Powers, 5 Blackf. (Ind.) 22; Bogan v. Calhoun, 19 La. Ann. 472; Dickinson v. Tunstall, 4 Ark. 170; Campbell v. Jones, 79 Ala. 475; Smith v. Goodlett, 92 Tenn. 230, 21 S. W. 106. So, if payable one year after the maker's death, with legal interest, Roffey v. Greenwell, 10 Adol. & E. 222, 2 Per. & D. 365; or "when he shall arrive at the age of twenty-one years, with legal interest thereon," etc., Winn v. Young, 1 J. J. Marsh. (Ky.) 51; or on the happening of a certain event, with annual interest, Washband v. Washband, 24 Conn. 500. So, if it is provided that the interest be "paid quarterly," English v. Watkins, 4 Ark. 199; or if the note is drawn with interest "until paid," Pittman v. Barret, 34 Mo. 84.

³⁶⁶ Staynor v. Knowler, 82 Ind. 157.

³⁶⁷ Chit. Bills, 763; Blake v. Lawrence, 4 Esp. 147.

³⁶⁸ Main v. Casserly, 67 Cal. 127, 7 Pac. 426; Hackenberry v. Shaw, 11 Ind. 392; Horn v. Nash, 1 Iowa, 204; Parvin v. Hoopes, Morris (Iowa) 387. Although it was to draw a lower rate of interest if paid at maturity, Daggett v. Pratt, 15 Mass. 177; or none at all, Flanders v. Chamberlain, 24 Mich. 306.

³⁶⁹ Gully v. Remy, 1 Blackf. (Ind.) 69; Horner v. Hunt, Id. 213; Satterwhite v. McKie, Harp. (S. C.) 397; Ely v. Witherspoon, 2 Ala. 131.

is paid at maturity.³⁷⁰ If a note is payable on demand, with lawful interest, it will in like manner carry interest from date, and not from maturity only.³⁷¹

Interest from Maturity.

§ 1709. Where there is no stipulation for interest, and the paper matures at a time certain, or at sight, it will draw interest from its maturity without prior demand.³⁷² And in some states it is provided by statute that all bills and notes shall bear interest from maturity, unless it is expressly stipulated that interest shall not accrue until after a certain date.³⁷³ But where a note is payable during a given month, but not on a particular day, it will draw interest only from the last day of the month.³⁷⁴

When interest is not expressly reserved, the holder must in all cases use ordinary diligence in trying to collect the bill.³⁷⁵ And it has been held that, without an express stipulation for interest, the maker will only be liable for interest from demand, if no demand is made at maturity.³⁷⁶ If the bill is payable at a certain time, it will draw interest from that day, unless its nonpayment at that time was due to the negligence of the holder.³⁷⁷ In such case the jury may refuse to allow interest, but otherwise the interest must be included in the verdict.³⁷⁸ If there is no one legally entitled to receive payment

³⁷⁰ *Parker v. Plymell*, 23 Kan. 402. But the rule in Indiana allows interest in such case only from maturity, *Billingsly v. Cahoon*, 7 Ind. 184.

³⁷¹ *Byles, Bills*, 309; *Benj. Chalm. Dig. art. 13*; 2 *Edw. Bills & N.* § 1007; *Hopper v. Richmond*, 1 *Starkie*, 507; *Paine v. Caswell*, 68 Me. 80. So, on a note "with interest on demand." *Whitton v. Swope*, 1 *Litt. (Ky.)* 160; *Pate v. Gray*, 1 *Hempst.* 155, *Fed. Cas. No. 10,794a*.

³⁷² *Byles, Bills*, 309; *Benj. Chalm. Dig. art. 213*; *Chit. Bills*, 762; 2 *Pars. Notes & B.* 393; *Lithgow v. Lyon*, 1 *Coop. Ch. Cas.* 29; *Lowndes v. Collens*, 17 *Ves.* 27; *Jacobs v. Adams*, 1 *Dall.* 52; *Sweet v. Hooper*, 62 Me. 54; *Joyner v. Turner*, 19 *Ark.* 690. So, if payable when a subscription is complete or at the maker's death. *Carr v. Robinson*, 8 *Bush (Ky.)* 269.

³⁷³ NORTH CAROLINA (Code, § 44); TENNESSEE (*Shannon's Code*, § 3494).

³⁷⁴ *Pollard v. Yoder*, 2 *A. K. Marsh. (Ky.)* 264.

³⁷⁵ *Chit. Bills*, 759; *Bann v. Dalzel*, *Moody & M.* 228, 3 *Car. & P.* 376.

³⁷⁶ *Bradford v. Cooper*, 1 *La. Ann.* 325.

³⁷⁷ *Chit. Bills*, 759; *Lalng v. Stone*, 2 *Man. & R.* 561; *Lithgow v. Lyon*, 1 *Coop. Ch. Cas.* 29.

³⁷⁸ *Chit. Bills*, 760; *Cameron v. Smith*, 2 *Barn. & Ald.* 308. And a verdict (2428)

at maturity (e. g. where the holder has died, and no personal representative is yet appointed), no interest will be reckoned until a lawful demand can be made.³⁷⁹

Interest on Demand Notes.

§ 1710. A demand note, without express reservation of interest, bears interest from demand only.³⁸⁰ So, too, an order drawn on a county treasurer or on a corporation,³⁸¹ or a bank note.³⁸² But where notes of a banking company are payable on demand, and no demand is made before the order to wind up the company, no interest can be recovered.³⁸³ If a note is payable on demand, without reserving interest, it will run from the time of commencing suit,³⁸⁴ and refusing interest on a note overdue for 30 years will not be disturbed by the court. *Du Belloix v. Lord Waterpark*, 1 Dowl. & R. 16. But, if there was an annexed agreement that suit should not be brought as long as the payee thought the maker safe, interest would be computed from maturity. *Rollman v. Baker*, 5 Humph. (Tenn.) 406.

³⁷⁹ Chit. Bills, 763; *Murray v. East India Co.*, 5 Barn. & Ald. 204.

³⁸⁰ Byles, Bills, 310; Benj. Chalm. Dig. art. 213; Chit. Bills, 762; 2 Edw. Bills & N. § 1009; 2 Pars. Notes & B. 393; *Barough v. White*, 4 Barn. & C. 327, 6 Dowl. & R. 379, 2 Car. & P. 8; *Upton v. Lord Ferrers*, 5 Ves. 801; *Farquhar v. Morris*, 7 Term R. 124; *Hard v. Palmer*, 21 U. C. Q. B. 49; *Breyfogle v. Beckley*, 16 Serg. & R. (Pa.) 264; *Adams v. Adams*, 55 N. J. Eq. 42, 35 Atl. 827; *Cannon v. Beggs*, 1 McCord (S. C.) 370; *Dillon v. Dudley*, 1 A. K. Marsh. (Ky.) 66; *Wallace v. Wallace*, 8 Ill. App. 69; *Hunter v. Wood*, 54 Ala. 71; *Maxcy v. Knight*, 18 Ala. 300; *Nelson v. Cartmel*, 6 Dana (Ky.) 7. Although the note was given for money loaned at the time it was made, *Hunter v. Wood*, 54 Ala. 71; and was so expressed, *Schmidt v. Limehouse*, 2 Bailey (S. C.) 276. So, on a check, interest runs from presentment and protest. *Niblack v. Bank* (Ill.) 48 N. E. 438.

³⁸¹ *Yellowly v. Commissioners*, 73 N. C. 164; *English v. Trustees*, 6 Ind. 437. So, an interest coupon payable on presentation bears interest only from demand. *Corcoran v. Canal Co.*, 1 MacArthur, 358. But in NORTH CAROLINA (Code, § 45), bills, bonds, or notes on demand bear interest from the time they are demandable, unless otherwise expressed. So, in TENNESSEE (Shannon's Code, § 3496).

³⁸² *Estate of Bank of Pennsylvania*, 60 Pa. St. 471. But the closing of the doors of a bank dispenses with formal demand, and interest will run from that time. *In re East of England Banking Co.*, L. R. 6 Eq. 368, L. R. 4 Ch. App. 14.

³⁸³ *In re Herefordshire Banking Co.*, L. R. 4 Eq. 250.

³⁸⁴ Byles, Bills, 310; Chit. Bills, 762; *Pierce v. Fothergill*, 2 Bing. N. C. (2429)

only from that time, where no demand has been previously made.³⁸⁵ But in other states interest runs from date, on a demand note,³⁸⁶ or a note which names no time for payment, and is, in effect, payable on demand.³⁸⁷

Interest until Tender—Bankruptcy.

§ 1711. Interest ceases to run after a sufficient tender of payment,³⁸⁸ although in Louisiana a tender has been held not to stop the running of interest without proof of injustice to the debtor by a judgment for the interest.³⁸⁹ Even where tender is made by an agent, and the money withheld until the note, which was lost, be found, and the money is afterwards lost by the insolvency of the agent, interest will stop from the date of the tender.³⁹⁰ But, where interest is expressly reserved, it is recoverable, although the payee has sufficient money of the maker's in his hands, which he has failed to apply to the bill.³⁹¹

The maker's bankruptcy stops the interest, in general, unless the previous dealings between the parties raise an agreement for interest by implication.³⁹² So, the maker of a note is not liable for interest after injunction granted at the instance of another indorsee

167; *Gore v. Buck*, 1 T. B. Mon. (Ky.) 209; *Bartlett v. Marshall*, 2 Bibb (Ky.) 467. But, to the effect that it cannot be allowed by the jury without proof of a previous demand, see *Patrick v. Clay*, 4 Bibb (Ky.) 246.

³⁸⁵ *Hunt v. Nevers*, 15 Pick. (Mass.) 500. So, of an I. O. U. *Gay v. Rooke*, 151 Mass. 115, 23 N. E. 835.

³⁸⁶ *Proctor v. Whitcomb*, 137 Mass. 303; *Pullen v. Chase*, 4 Ark. 210; *Walker v. Wills*, 5 Ark. 103; *Edgmon v. Ashelby*, 78 Ill. 161.

³⁸⁷ *Gaylord v. Van Loan*, 15 Wend. (N. Y.) 308; *Francis v. Castleman*, 4 Bibb (Ky.) 282. So, a money bond. *Purdy v. Phillips*, 11 N. Y. 406.

³⁸⁸ *Byles, Bills*, 311; 2 Pars. Notes & B. 394; *Dept v. Dunn*, 3 Camp. 296. So, on a bank note, *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.) 106; or a coupon, *Bailey v. Buchanan Co.*, 115 N. Y. 297, 22 N. E. 155. But not where the maker disputes the note after making the tender. *Tishomingo Sav. Inst. v. Buchanan*, 60 Miss. 496.

³⁸⁹ *Thiel v. Conrad*, 21 La. Ann. 214.

³⁹⁰ *Chit. Bills*, 760; *Dent v. Dunn*, 3 Camp. 296. But not where there was no right to demand such indemnity, because the lost note was specially indorsed. *Dudman v. Earl*, 49 Iowa, 37.

³⁹¹ *Laughlin v. Wright*, 63 Cal. 113.

³⁹² *Chit. Bills*, 760; *Ex parte Williams*, 1 Rose, 399; *Ex parte Cocks*, Id. (2430)

against payment by him.³⁹³ Interest was formerly allowed only to the commencement of the action,³⁹⁴ but it is now reckoned down to final judgment.³⁹⁵ And on payment of money into court the interest must be paid down to the date of such payment, and not merely to the commencement of the action.³⁹⁶

Interest after Maturity.

§ 1712. Where no interest is reserved in a note, it will draw interest after maturity at the legal rate.³⁹⁷ And if the note reserves interest at a higher rate from a day named, before its maturity, it will continue to bear the same rate of interest after maturity, although the rate established by the *lex fori* may be lower.³⁹⁸ And in some states, where a note bears interest at a designated rate, it will bear the same rate after maturity.³⁹⁹ So, where it bears a certain rate

317; *Lowndes v. Collens*, 17 Ves. 27; *Lithgow v. Lyon*, 1 Coop. t. Eld. 20. And, if interest is not expressed, even prior interest cannot be included in the petitioning creditor's claim. *Ex parte Greenway*, Buck, 412.

³⁹³ *Stevens v. Barringer*, 13 Wend. (N. Y.) 639.

³⁹⁴ *Byles*, Bills, 310; *Chit. Bills*, 763; *Robinson v. Bland*, 2 Burrows, 1077; *Randolph v. Raginder*, Prac. Reg. C. P. 357. And if, by the terms of the note, the interest is not to begin until a certain day, and suit is begun before that time, the judgment cannot include such interest. *Billingsley's Adm'r v. Billingsley*, 24 Ala. 518.

³⁹⁵ *Chit. Bills*, 763; 2 Pars. Notes & B. 394; *Jarrold v. Rowe*, 8 Price, 582; or until verdict, *Palne v. Caswell*, 68 Me. 80; or until allowance as a claim against the deceased maker's estate, *Jameson v. Barber*, 53 Wis. 630, 14 N. W. 850.

³⁹⁶ *Byles*, Bills, 310; *Chit. Bills*, 764; *Mercer v. Jones*, 3 Camp. 477; or, in default, the action may proceed for the balance of interest due, *Kidd v. Walker*, 2 Barn. & Adol. 705.

³⁹⁷ And payments credited at 10 per cent. without the maker's consent will be changed to the legal rate. *Godfrey v. Craycraft*, 81 Ind. 476. The rate is determined by the *lex fori*, and although less than that of the place of the contract. *Ives v. Bank*, 2 Allen (Mass.) 236.

³⁹⁸ *Overton v. Bolton*, 9 Helsk. (Tenn.) 762.

³⁹⁹ *Broadway Sav. Bank v. Forbes*, 79 Mo. 226, affirming 9 Mo. App. 575; *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Howland v. Jennings*, 11 U. C. C. P. 272; *Buckingham v. Orr*, 6 Colo. 587; *Augusta Nat. Bank v. Hewins*, 90 Me. 255, 38 Atl. 156; *Chafoin v. Rich*, 92 Cal. 471, 28 Pac. 488; *Meaders v. Gray*, 60 Miss. 400; *Tishomingo Sav. Inst. v. Buchanan*, Id. 496; *Kohler v. Smith*, 2 Cal. 597; *Hand v. Armstrong*, 18 Iowa, 324. So, in In-

of interest "from date,"⁴⁰⁰ or "until maturity,"⁴⁰¹ or during the life of the payee.⁴⁰² But, where a note bearing interest at 10 per cent. is extended at 9 per cent., the original rate of interest will revive after the expiration of the extension.⁴⁰³ And interest may be recovered, in general, from maturity until judgment, at the rate reserved before maturity.⁴⁰⁴ So, in Iowa, until payment in the case of a municipal bond, which expressly reserved 10 per cent., although the attached coupon (without such reservation) only draws the legal rate of 6 per cent.⁴⁰⁵ In other states, also, the rate reserved before ma-

diana. *Shaw v. Rigby*, 84 Ind. 375, overruling *Burns v. Anderson*, 68 Ind. 202, and *Richards v. McPherson*, 74 Ind. 158, and re-establishing *Kilgore v. Powers*, 5 Blackf. 22, as the Indiana rule. So, where a note is payable one day after date, "with interest from date at twelve per cent. per annum payable annually." *Sharpe v. Lee*, 14 S. C. 341. So, where the expressed rate is lower than the legal rate. *Schmidt v. Bank*, 153 Mass. 550, 27 N. E. 595.

⁴⁰⁰ *Borders v. Barber*, 81 Mo. 636; *Briscoe v. Kinealy*, 8 Mo. App. 76; *Maguire v. Filley*, 9 Mo. App. 581; *Thompson v. Pickel*, 20 Iowa, 490; *Kellogg v. Lavender*, 15 Neb. 256, 18 N. W. 38; *Monnett v. Sturges*, 25 Ohio St. 384; *Cecil v. Hicks*, 29 Grat. (Va.) 1. So, a city bond with 10 per cent. interest "per annum payable annually on presentment of the annexed warrant." *Pruyn v. City of Milwaukee*, 13 Wis. 367. So, where there were interest coupons running up to the maturity of the principal note, and no further. *Holbrook v. Sims*, 39 Minn. 122, 39 N. W. 74, 140. The cessation of coupons raises no presumption that interest shall stop. *Kendall v. Porter* (Cal.) 52 Pac. 143. And outstanding coupons, which are not yet due, do not prevent the reckoning of interest up to date of judgment. *Guignon v. Trust Co.*, 156 Ill. 135, 40 N. E. 556.

⁴⁰¹ *Hamer v. Rigby*, 65 Miss. 41, 3 South. 137; *Macon Co. v. Rodgers*, 84 Mo. 66. But see, contra, *Cook v. Courtright*, 40 Ohio St. 248.

⁴⁰² *Gale v. Corey*, 112 Ind. 39, 13 N. E. 108, and 14 N. E. 362. In this case the interest was interrupted from the payee's death until the maturity of the note.

⁴⁰³ *North v. Walker*, 66 Mo. 453.

⁴⁰⁴ *Andrews v. Keeler*, 19 Hun (N. Y.) 87; *Montgomery v. Boucher*, 14 U. C. C. P. 45; *Pridgen v. Andrews*, 7 Tex. 461; or on a demand note until verdict, *Colby v. Bunker*, 68 Me. 524; although exceeding the legal rate, *Hopkins v. Crittenden*, 10 Tex. 189. And after judgment interest accrues at the rate fixed by statute, *Marshall v. Green* (Ky.) 1 S. W. 602; *Burkhart v. Sappington*, 1 G. Greene (Iowa) 66; and in force at that time, *Verree v. Mughes*, 11 N. J. Law, 91; and within the jurisdiction invoked, *Gordon v. Phelps*, 7 J. J. Marsh. (Ky.) 619; although the higher rate is expressly "until paid," *Wade v. Pratt*, 12 Helsk. (Tenn.) 231.

⁴⁰⁵ *Cromwell v. Sac Co.*, 96 U. S. 51.

turity continues, by force of the statute, until payment.⁴⁰⁶ And this rule applies to a note payable one day after date, with interest "from date";⁴⁰⁷ and clearly so, if expressly "until paid."⁴⁰⁸

But in some states interest after maturity must be reckoned at the rate fixed and implied by law, whether interest before maturity was reserved in the instrument at a higher⁴⁰⁹ or a lower rate.⁴¹⁰ And such rate will be allowed after maturity, although the note is discounted by a bank which is limited by its charter to a lower rate.⁴¹¹ In some states the statute provides what rate shall be recoverable after maturity.⁴¹²

⁴⁰⁶ *Kerr v. Haverstick*, 94 Ind. 178; *Burns v. Anderson*, 68 Ind. 202; *Corcoran v. Doll*, 32 Cal. 82; *Cecil v. Hicks*, 29 Grat. (Va.) 1; *Cox v. Smith*, 1 Nev. 161; *McLane v. Abrams*, 2 Nev. 199. So, in Illinois. *United States Mortg. Co. v. Sperry*, 26 Fed. 727; *Ohio v. Frank*, 103 U. S. 697; *Phinney v. Baldwin*, 16 Ill. 108. But see, contra, *White v. Haffaker*, 27 Ill. 349; *Lamprey v. Mason*, 148 Mass. 231, 19 N. E. 350; St. 1888, c. 388.

⁴⁰⁷ *Gray v. Briscoe*, 6 Bush (Ky.) 687. Although it seems that in Arkansas it would only bear such specified rate until maturity, if payable at a later day, and a contrary intention could not be shown by parol evidence. *Casteel v. Walker*, 40 Ark. 117.

⁴⁰⁸ *Mobley v. Davega*, 16 S. C. 73. But judgment in New York on a note made in England, "with interest until paid in England," includes interest to judgment only at the (lower) English rate. *Seofield v. Day*, 20 Johns. 102.

⁴⁰⁹ *Burnhisel v. Firman*, 22 Wall. 170; *Holden v. Trust Co.*, 100 U. S. 72; *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408; *Ward v. Morrison*, Car. & M. 368; *Rilling v. Thompson*, 12 Bush (Ky.) 310; *Duran v. Ayer*, 67 Me. 145; *Eaton v. Boissonnault*, 67 Me. 540; *Robinson v. Kinney*, 2 Kan. 184; *Searle v. Adams*, 3 Kan. 515; *Lacy v. Dunn*, 5 Kan. 567; *Clark v. Russell*, 1 Colo. 52; *White v. Curd*, 86 Ky. 192, 5 S. W. 553; *Shelden v. Barlow*, 108 Mich. 375, 66 N. W. 338; *Newton v. Kennerly*, 31 Ark. 626. So, where the note calls for the higher rate "from date." *Brewster v. Wakefield*, 22 How. 118, overruling 1 Minn. 352 (Gil. 260); *Briggs v. Winsmith*, 10 S. C. 133; *Gardner v. Barnett*, 36 Ark. 476; *Woodruff v. Webb*, 32 Ark. 612; *Lemay v. Williams*, Id. 166; *Perry v. Taylor*, 1 Utah, 63; or a fortiori if expressed to be from July 8th to December 21st, *Rushing v. Sebree*, 12 Bush (Ky.) 198. So, after the bill is taken up by an indorser, *Stanley v. McElrath*, 86 Cal. 449, 25 Pac. 16; *McCrary v. Jones*, 44 S. C. 406, 22 S. E. 414; or acceptor, *Martin v. Muncy*, 40 La. Ann. 190, 3 South. 640.

⁴¹⁰ *Moreland v. Lawrence*, 23 Minn. 84. So, of a bond, *Ludwick v. Huntzinger*, 5 Watts & S. (Pa.) 51; or trust certificate, *Tuffil v. Trust Co.*, 2 Dian. (Ohio) 121.

⁴¹¹ *United States Bank v. Chapin*, 9 Wend. (N. Y.) 471.

⁴¹² Thus, in KENTUCKY, judgments bear 6 per cent. on the rate expressed

Higher Rate Reserved after Maturity.

§ 1713. Where a higher rate of interest is expressly reserved to be paid after maturity, such amount is recoverable, if not prohibited by statute.⁴¹³ And it has been held that the maker may prove by parol an agreement that no interest should be charged after maturity.⁴¹⁴ But where a note is payable in six months, "without interest," it will be entitled to interest after maturity.⁴¹⁵ On the other hand, interest "from maturity" will run from the day designated, without allowing for days of grace.⁴¹⁶ Where a note provides for a higher rate of interest after maturity as damages, if it is not paid when due, such agreement is a penalty,⁴¹⁷ but has been held to be valid as stipulated damages,⁴¹⁸ and not to be usurious,⁴¹⁹ nor to affect the negotiability of the note or the bona fides of the purchaser.⁴²⁰ Such agreement is, however, strictly construed. Thus, the interest runs from maturity, and not from date, where the note provides for a higher rate of interest "until paid, * * * if not paid when due."⁴²¹ So, where the interest is payable yearly, and is to bear the same rate if not paid, interest accruing after maturity will not be compounded.⁴²² Where in the bill; and, if the rate is higher than 6 per cent., it is reduced to that rate at the death of the promisor or the maturity of the instrument. Ky. St. § 2220. In SOUTH CAROLINA, protested bills bear 7 per cent. from maturity until payment. 1 Rev. St. § 1400. In MISSISSIPPI, judgments bear interest at the same rate as the contract on which they are founded. Ann. Code, § 2350.

⁴¹³ 2 Daniel, Neg. Inst. 464; 2 Edw. Bills & N. § 1005.

⁴¹⁴ Elliott v. Elliott, 79 Ky. 277.

⁴¹⁵ Roberts v. Smith, 64 Tex. 94.

⁴¹⁶ Letchford v. Starns, 16 La. Ann. 252.

⁴¹⁷ Brown v. Maulsby, 17 Ind. 10. And disregarded as such. Smith v. Crane, 33 Minn. 144, 22 N. W. 633; Henry v. Thompson, Min. (Ala.) 200; Berry v. Wisdom, 3 Ohio St. 241.

⁴¹⁸ Bane v. Gridley, 67 Ill. 388; Witherow v. Briggs, Id. 96; Miller v. Kempner, 32 Ark. 573; Hubbard v. Callahan, 42 Conn. 524; Crapo v. Hefner (Neb.) 73 N. W. 702; Hallam v. Telleren (Neb.) 75 N. W. 560. And may even run back to the date. Finger v. McCaughey, 114 Cal. 64, 45 Pac. 1004; Capen v. Crowell, 66 Me. 282; Wilkinson v. Daniels, 1 G. Greene (Iowa) 179.

⁴¹⁹ Davis v. Rider, 53 Ill. 416.

⁴²⁰ Parker v. Plymell, 23 Kan. 402.

⁴²¹ Wernwag v. Mothershead, 3 Blackf. (Ind.) 401.

⁴²² Vaughan v. Kennan, 38 Ark. 114.

a high rate is reserved as a penalty, if the note is not paid at maturity, it will be waived, if the holder afterwards receives interest at the original rate.⁴²³ And in Minnesota parties are forbidden by statute to stipulate for interest on a note at a higher rate after maturity than before.⁴²⁴

Exchange and Re-exchange.

§ 1714. The term "exchange" is used to designate the market value in one country of money to be delivered in another. The drawer of a foreign bill of exchange contracts for the payment of the money at the place on which the bill is drawn payable. By the law merchant, the holder of the bill may call upon the drawer to make good such payment by drawing a bill of re-exchange upon him. Re-exchange is the expense which the drawer incurs by the dishonor of a bill in a foreign country,—the cost of a bill of re-exchange, if it were actually drawn.⁴²⁵ The measure of this liability is determined by the laws of the country where the original bill is drawn.⁴²⁶ This cost of replacing the amount at the place of payment—that is to say, the face of the bill with the exchange—is, in general, recoverable against the drawer. But where the bill is drawn by an agent for his principal's account, and is taken up for him by his correspondent, he cannot, like a purchaser, recover against his principal exchange or statutory damages not actually paid by himself.⁴²⁷ The common rule is to allow only the ordinary exchange at the time of recovery, irrespective of the former rate, or the original cost at the time the bill was drawn.⁴²⁸ Exchange is not the mere cost of transportation, but the market price of a good bill.⁴²⁹

⁴²³ *Bradford v. Holles*, 66 Ill. 517.

⁴²⁴ *Newell v. Houlton*, 22 Minn. 19; Gen. St. § 2212. But such note will draw the legal rate after maturity. *White v. Iltis*, 24 Minn. 43.

⁴²⁵ *Bytes*, Bills, 418; *Benj. Chalm. Dig. art. 221*; 2 *Daniel*, Neg. Inst. 452; 1 *Pars. Notes & B.* 648; *Story*, Bills, § 400.

⁴²⁶ 1 *Pars. Notes & B.* 651.

⁴²⁷ *Greene v. Goddard*, 9 Metc. (Mass.) 214.

⁴²⁸ Whether more (*Auriol v. Thomas*, 2 Term R. 52) or less than the original cost (*Hendricks v. Franklin*, 4 Johns. [N. Y.] 119). And usage of an option to recover either original cost or exchange is inadmissible. *Suse v. Pompe*, 8 C. B. (N. S.) 538.

⁴²⁹ Although the bill has since depreciated. *Balch v. Colman*, 2 McLean, 85, Fed. Cas. No. 791.

The acceptor of a bill is not, in general, liable for exchange at common law, since his agreement was to pay at the place of payment, and not at the place of drawing.⁴³⁰ But where a drawer has been obliged to pay statutory damages by way of re-exchange, according to the law of his place of contract, he may recover such damages against the acceptor, or prove them against his estate in bankruptcy.⁴³¹

The drawer of a foreign bill may be liable for re-exchange, although the bill has been returned circuitously through many hands,⁴³² since each indorser is in effect a new drawer, and each indorsee may look to his indorser, and draw a bill of re-exchange on him. So, where there is no direct exchange between two countries, on account of war, and an indirect exchange exists through a third country, the bill must be paid by the drawer with such exchange.⁴³³ But if a country is in the enemy's hands, or under blockade, it may be found by the jury, as a fact, that there is no existing exchange to be allowed.⁴³⁴ A drawer in England will not, however, be relieved from liability from re-exchange because the drawee in France was forbidden by his government to make payment to an alien enemy.⁴³⁵ On the other hand, if the bill is made payable in a foreign country merely for the purpose of negotiation at the place where it is drawn, to put the holder in funds there, the holder will not be entitled to recover exchange on it against the drawer.⁴³⁶

§ 1715. — Promissory notes, in general, are not entitled to exchange, unless they are expressly so drawn.⁴³⁷ So, exchange cannot

⁴³⁰ Byles, Bills, 420; 2 Daniel, Neg. Inst. 456; 1 Pars. Notes & B. 650; Napier v. Shneider, 12 East, 420; Woolsey v. Crawford, 2 Camp. 445; Watt v. Riddle, 8 Watts (Pa.) 545.

⁴³¹ Francis v. Rucker, Amb. 672; Walker v. Hamilton, 1 De Gex, F. & J. 602; In re General South American Co., 7 Ch. Div. 637. Or he may recover at law against the acceptor. Riggs v. Lindsay, 7 Cranch, 501.

⁴³² Byles, Bills, 420; 2 Daniel, Neg. Inst. 454; 1 Pars. Notes & B. 652; Mellish v. Simeon, 2 H. Bl. 378.

⁴³³ Pollard v. Herries, 3 Bos. & P. 335.

⁴³⁴ Chit. Bills, 383; De Tastet v. Baring, 11 East, 265, 2 Camp. 65.

⁴³⁵ Mellish v. Simeon, 2 H. Bl. 378.

⁴³⁶ Williams v. Ayers, 3 App. Cas. 133.

⁴³⁷ 2 Daniel, Neg. Inst. 461; 1 Pars. Notes & B. 652; Grutacap v. Woullulise, 2 McLean, 581, Fed. Cas. No. 5,854. And it has been held sufficient, if it is merely made payable in another place. Wood v. Kelso, 27 Pa. St. 241. But

be had on a note, between the place of payment and the place where suit is brought, without an express agreement to that effect.⁴³⁸ And, if goods are purchased and paid for by the foreign purchaser's bill on another English house, the holder cannot sue upon the original consideration after the bankruptcy of the acceptor, and recover exchange as part of his damages.⁴³⁹

The parties may expressly fix the amount of exchange and expenses at any designated sum.⁴⁴⁰ And a note given to take up a bill drawn between parties in the same state, and not itself subject to statutory damages, may include the amount of re-exchange, as liquidated damages recoverable against the drawer.⁴⁴¹ The amount of exchange recoverable is determined by the law of the place where the bill is drawn, and is a fluctuating rate, dependent upon market prices, unless fixed by law or contract.⁴⁴² In general, the rate of a foreign exchange is a fact that must be proved by the holder.⁴⁴³ By the law merchant, exchange is recoverable at the rate prevailing when the notice of dishonor was given.⁴⁴⁴ If a bill is payable in foreign coin, the amount recoverable is the metal value of standard

see. contra, *Scofield v. Day*, 20 Johns. (N. Y.) 102. And exchange can only be recovered on special averments. *Weed v. Miller*, 1 McLean, 423, Fed. Cas. No. 17,346.

⁴³⁸ *Chumasero v. Gilbert*, 24 Ill. 651. "With current rate of exchange" in a note being unnecessary surplusage. *Hill v. Todd*, 29 Ill. 101. The contrary was held, however, in *Grutacap v. Woullulise*, supra.

⁴³⁹ *Alcock v. Hopkins*, 6 Cush. (Mass.) 484. Although it has been held that he may recover exchange on an account payable in another country. *Grant v. Healey*, 3 Sumn. 523, Fed. Cas. No. 5,696.

⁴⁴⁰ 2 *Daniel*, Neg. Inst. 453; 1 *Pars. Notes & B.* 653.

⁴⁴¹ *Bank of U. S. v. Daniel*, 12 Pet. 32.

⁴⁴² "There is no rule of law fixing the rate which may be lawfully charged for exchange. It does not altogether depend upon the cost of transporting specie from one place to another, although the price of exchange is, no doubt, influenced by it. But it is also materially affected by the state of the trade, by the urgency of the demand for remittances and by the quantity brought into the market for sale; and sometimes material changes take place in a single day, although no alteration has happened in the expenses of transporting specie. The court therefore can lay down no rule upon the subject." *Taney, C. J.*, in *Andrews v. Pond*, 13 Pet. 65, 77.

⁴⁴³ *Butt v. Hoge*, 2 Hill. (N. Y.) 81.

⁴⁴⁴ *Cowperthwaite v. Sheffield*, 1 Sandf. (N. Y.) 416; *Denston v. Henderson*, 13 Johns. (N. Y.) 322; *Graves v. Dash*, 12 Johns. (N. Y.) 17; *Hendricks v. Frank-*

coin, which is ascertained and proclaimed annually in the United States by the secretary of the treasury. Thus, the English pound sterling is now fixed at \$4.86 $\frac{1}{2}$.⁴⁴⁵

Some statutes provide that bills payable in United States currency are recoverable without exchange, exchange being allowed only on the bills payable in foreign coin.⁴⁴⁶ Others provide for damages in lieu of exchange. And in South Carolina it is provided that the jury may give the true difference of exchange on bills payable in any other country.⁴⁴⁷

Notarial Fees.

§ 1716. The fees for protest of a bill are recoverable as part of plaintiff's damages, where protest is required by law.⁴⁴⁸ And they may be recovered as damages against the indorser of a note,⁴⁴⁹ but not unless protest is necessary.⁴⁵⁰ And they cannot be recovered against the maker of a bank bill.⁴⁵¹ The holder's damages may include necessary expenses, such as postage and telegrams, as well as protest fees.⁴⁵² And, where the holder has been obliged to incur the expense of a special messenger in giving notice, such expense is recoverable.⁴⁵³

lin, 4 Johns. (N. Y.) 119; *U. S. v. Barker*, 1 Paine, C. C. 156, Fed. Cas. No. 14,517.

⁴⁴⁵ Rev. St. U. S. §§ 3565, 3566.

⁴⁴⁶ ALABAMA (Code, § 1773); INDIANA (Horner's Rev. St. § 5509); LOUISIANA (Rev. St. §§ 322, 323); MISSOURI (Rev. St. §§ 731, 732); NEVADA (Rev. Laws, §§ 322, 323); UTAH (Rev. St. §§ 1656, 1657).

⁴⁴⁷ SOUTH CAROLINA (1 Rev. St. § 1402).

⁴⁴⁸ Byles, Bills, 415; Benj. Chalm. Dig. art. 213; 2 Daniel, Neg. Inst. 463.

⁴⁴⁹ *Merritt v. Benton*, 10 Wend. (N. Y.) 117. Where the protest is evidence of demand, *Doughty v. Hildt*, 1 McLean, 334, Fed. Cas. No. 4,027; and the indorser has received notice of dishonor, *Curtis v. Buckley*, 14 Kan. 450.

⁴⁵⁰ *Cramer v. Manufacturing Co.*, 23 Kan. 399.

⁴⁵¹ *Johnson v. Bank*, 29 Ga. 259.

⁴⁵² Byles, Bills, 420; *Dickinson v. Hatfield*, 1 Moody & R. 141, 5 Car. & P. 46; *Prehn v. Bank*, L. R. 5 Exch. 92. But it has been held that such expenses must be specially averred in the declaration. *Kendrick v. Lomax*, 2 Crompt. & J. 405, 2 Tyrw. 438.

⁴⁵³ Chit. Bills, 533; 2 Daniel, Neg. Inst. 463; *Pearson v. Crallan*, 2 J. P. Smith, 404.

Commissions—Attorney's Fees.

§ 1717. A commission incurred in the collection, and known as "provision" for the bill, to the extent of one-half of 1 per cent., may also be recovered by the law merchant.⁴⁵⁴

A bill or note may also contain a stipulation for attorney's fees, and they may be included in the judgment.⁴⁵⁵ But such fees will not draw interest pending an appeal or other legal delay before payment.⁴⁵⁶ And if such fees are expressly reserved, but are not collectible in the original action on the note, a valid tender of the face of the note before suit, without such fees, will be sufficient.⁴⁵⁷ And no recovery can be had on such stipulation for fees, unless it is specially declared upon.⁴⁵⁸ And the note is not of itself sufficient evidence to support a judgment for the fees reserved in it.⁴⁵⁹ And if they are to be paid, if the note is "not paid when due, and the same is sued," they are not due until suit is brought, and cannot be recovered in an action on the note.⁴⁶⁰

⁴⁵⁴ Chit. Bills, 770; 2 Daniel, Neg. Inst. 463. And the commissions incurred may even exceed the sum agreed on for damages for nonacceptance. *Prehn v. Bank*, L. R. 5 Exch. 92. But, under the bills of exchange act, commissions of acceptor *supra* protest, and expenses of protest for better security, are not recoverable. *In re English Bank of River Plate* [1893] 2 Ch. 438.

⁴⁵⁵ *Smiley v. Meir*, 47 Ind. 559; *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72 (in foreclosure of mortgage not containing the provision). So far as reasonable. *Campbell v. Worman*, 58 Minn. 561, 60 N. W. 668; *Guthrie v. Reid*, 107 Pa. St. 251; *Ray v. Pease*, 97 Ga. 618, 25 S. E. 360 (before Act 1891). But the assignor of a note is not liable to his assignee for such fees. *Short v. Coffeen*, 76 Ill. 245. And the guaranty of a note "to pay all costs and expenses paid or incurred in collecting the same" includes only legal costs, not charges for trouble, etc. *Wetherbee v. Kusterer*, 41 Mich. 359, 2 N. W. 45. And see § 205, *supra*.

⁴⁵⁶ *Star Wagon Co. v. Swezy*, 63 Iowa, 520, 19 N. W. 298.

⁴⁵⁷ *Pinney v. Jorgenson*, 27 Minn. 26, 6 N. W. 376.

⁴⁵⁸ *Nickerson v. Sheldon*, 33 Ill. 372.

⁴⁵⁹ *Bowser v. Palmer*, 33 Ind. 124.

⁴⁶⁰ *Easter v. Boyd*, 79 Ill. 325. But a note providing for interest to be compounded, if not paid at maturity, and for attorney's fees, does not make the latter conditional on nonpayment at maturity. *Fitch v. Bank*, 97 Ind. 211.

Costs of Other Suit.

§ 1718. Where the principal debtor pays a bill after several actions brought against the other parties to it, the holder will still be entitled to his costs in every action, unless it is otherwise provided by statute.⁴⁶¹ But in Pennsylvania it is provided that attorney's fees cannot be taxed in more than one suit on the same instrument.⁴⁶² And it has been held that an indorsee cannot recover costs in an action against the maker, after receiving satisfaction from the indorser in an action subsequently begun against him.⁴⁶³ And one party is not liable for the costs incurred by another; e. g. an indorser, for costs recovered against the acceptor.⁴⁶⁴ But he will be liable for such costs, if they were incurred at his request and on his responsibility.⁴⁶⁵ It is provided expressly in Alabama that the costs incurred in a suit against the maker may be recovered against the assignor of a note.⁴⁶⁶ An acceptor is not liable for costs incurred in a suit against the indorser.⁴⁶⁷ But, where a party seeks the indulgence of the court (e. g. on an application for a stay of proceedings), he may be required to pay the costs in another suit, also.⁴⁶⁸

Damages on Dishonor—What Law Governs.

§ 1719. The liability of the indorser of a foreign bill for damages is determined by the law of the place of indorsement;⁴⁶⁹ and that of the drawer by the law of the place where the bill is drawn,⁴⁷⁰ and

⁴⁶¹ Byles, Bills, 411; Benj. Chalm. Dig. art. 232; 2 Pars. Notes & B. 458; Toms v. Powell, 6 Esp. 40, 7 East, 536.

⁴⁶² Purd. Dig. p. 188, § 9; Id. p. 1371, § 9.

⁴⁶³ Gilmore v. Carr, 2 Mass. 171.

⁴⁶⁴ Bangor Bank v. Hook, 5 Me. 174.

⁴⁶⁵ And that without proof of payment of the costs to the attorney. Bullock v. Lloyd, 2 Car. & P. 119.

⁴⁶⁶ ALABAMA (Code, § 1782); and if nonnegotiable (Id.).

⁴⁶⁷ Barnwell v. Mitchell, 3 Conn. 101.

⁴⁶⁸ Byles, Bills, 418; 2 Pars. Notes & B. 458; Smith v. Woodcock, 4 Term R. 691; Lewis v. Dalrymple, 3 Dowl. 433. But this is not necessary. Cornes v. Taylor, 10 Exch. 441.

⁴⁶⁹ Slacum v. Pomery, 6 Cranch, 221; Cullum v. Casey, 9 Port. (Ala.) 131.

⁴⁷⁰ Price v. Page, 24 Mo. 65; Page v. Page, Id. 595. So, in England, if proved as special damages, and notwithstanding the allowance in the Bills (2440)

not where the suit is brought.⁴⁷¹ Thus, if a bill is drawn and indorsed in Alabama upon a house in London, the law of Alabama will fix the liability of drawer and indorser for damages.⁴⁷² And this is so even where the bill is sent to England with blanks left to be filled on its being negotiated there, and in such case the law in force at the time the bill was drawn will govern.⁴⁷³ Where an accommodation acceptor, however, brings suit against the drawer, it has been held that his right to damages will be regulated by the law of the place of payment, provided such rate is not larger than that allowed by the law where the bill was drawn.⁴⁷⁴

Statutory Damages.

§ 1720. By custom recognized by the law merchant, damages are sometimes allowed in addition to exchange, or in lieu of it, without any statutory provision. Thus, in Massachusetts, the holder of a protested foreign bill was formerly entitled to recover 10 per cent. damages, by custom, besides interest and protest fees.⁴⁷⁵ And this custom, which extended to Maine, also, has been held to be a part of the contract, and not subject to be changed by the court in a time of crisis.⁴⁷⁶ In New York the holder of a protested foreign bill might formerly recover 20 per cent. damages against the drawer, besides exchange and interest.⁴⁷⁷ In Rhode Island, where a bill was payable in sterling money, it was held that the court might assess

of Exchange Act for indorsement of "liquidated damages." In *re Gillespie*, 18 Q. B. Div. 286, affirming 16 Q. B. Div. 702. Otherwise, in general, the law of the place of payment controls. In *re Commercial Bank of South Australia*, 36 Ch. Div. 522.

⁴⁷¹ Though the statute was repealed after protest and before action brought. *Allen v. Bank*, 5 Whart. (Pa.) 420.

⁴⁷² *Cowperthwaite v. Sheffield*, 1 Sandf. (N. Y.) 416. Although it was first negotiated in another state. *Ex parte Heidelback*, 2 Low. 526, Fed. Cas. No. 6,322.

⁴⁷³ *Lennig v. Ralston*, 23 Pa. St. 137.

⁴⁷⁴ *Cooper v. Sandford*, 4 Yerg. (Tenn.) 452.

⁴⁷⁵ *Grimshaw v. Bender*, 6 Mass. 157; *Barclay v. Minchin*, Id. 162.

⁴⁷⁶ *Wood v. Watson*, 53 Me. 300.

⁴⁷⁷ *Denston v. Henderson*, 13 Johns. 322; *Graves v. Dash*, 12 Johns. 17. Although the 20 per cent. was originally held to include all re-exchange. *Hendricks v. Franklin*, 4 Johns. 119.

10 per cent. damages upon it against the drawer.⁴⁷⁸ Such damages are now provided for by statute in many of the United States.⁴⁷⁹

⁴⁷⁸ *Brown v. Van Bamm*, 3 Dall. 344.

⁴⁷⁹ In ALABAMA the statute allows 5 per cent. on protested bills, inland or foreign, in lieu of all charges other than protest fees before protest (Code, §§ 1771, 1772), on protest for nonacceptance or nonpayment (Id. § 1775); also 100 per cent. from date of issue on bills not exceeding one dollar, issued without authority of law (Id. § 1755). ARKANSAS: On protested bills "for value" after date, 4 or 5 per cent. if payable in the United States, according to locality, and 10 per cent. if payable beyond the United States (Sand. & H. Dig. § 482); and, against the acceptor, 2, 6, or 10 per cent., according as the drawer resides in Arkansas, in other of the United States, or in a foreign country (Id. § 483). CALIFORNIA: In lieu of interest before notice of dishonor, re-exchange, expenses, and all other damage, and in favor of holders for value only, on protested bills, 2 per cent. if drawn on persons in the state; 5 or 10 per cent., according to locality, if drawn on another state; and 15 per cent. if drawn on any foreign country (Civ. Code, §§ 3234-3236). COLORADO: 10 per cent. damages, besides charges of protest, on foreign bills and bills drawn on persons out of Colorado, and within the United States (Mills' Ann. St. §§ 241, 242). CONNECTICUT: Bills drawn upon other states, and protested, 2, 3, 5, or 8 per cent., according to locality, in lieu of interest and charges before notice of dishonor (Gen. St. 1864). NORTH DAKOTA: In favor of holders for value only, on protested bills, in lieu of interest, exchange, and other expenses before notice of dishonor, 2 per cent. if drawn on persons in the territory; 3 or 5 per cent. on other of the United States, according to locality; and 10 per cent. on any foreign country (Rev. Codes, §§ 4956, 4957). DELAWARE: 20 per cent. on bills drawn on persons beyond seas, and protested against drawer, indorser, and all concerned (Rev. Code, c. 63, § 3). The DISTRICT OF COLUMBIA: On protested bills, 15 per cent. if drawn on any foreign country, and 8 per cent. on any other of the United States, besides re-exchange and costs of protest; and an indorser paying such damages may recover, with interest on the same, from prior parties (Comp. St. c. 8, §§ 11, 13). GEORGIA: On protested bills payable at any place out of Georgia, and within the United States, 5 per cent., and on bills payable out of the United States 10 per cent., besides interest and protest fees, the acceptor also being liable (Civ. Code, §§ 3689, 3690). ILLINOIS: 10 per cent. damages on protested bills payable without the United States, and (where suit is brought) 5 per cent. on bills drawn on other of the United States, besides legal interest from maturity and costs of protest (Hurd's Rev. St. c. 98, §§ 1, 2). INDIANA: In favor of holder for value only, 5 per cent. on protested bills drawn on other of the United States, and 10 per cent. on a foreign country, inclusive of interest before protest and exchange between different states, unless paid on notice of protest (Horner's Rev. St. §§ 5507-5511); but this does not apply to bills payable without the

Statutory damages are not given as a penalty against the drawer for drawing without authority, but as a compensation for, and in lieu of, re-exchange and other damages.⁴⁸⁰

state, but not intended to be presented there, and provided for within the state (Id. § 5512); nor to notes discounted by a bank and protested for non-payment (Id. § 5513). IOWA: 5 per cent. when drawn on any foreign country, or on California, Oregon, Nevada, or any territory, and 3 per cent. on any other of the United States, together with interest (Code, § 3055). KANSAS: Negotiable paper drawn on persons outside of the state, and protested, is subject to 6 per cent. damages, and no person in Kansas is liable to protest damages (2 Gen. St. c. 115, §§ 16, 17). Damages may also be recovered of a party promising to accept, and then refusing, by a promisee who takes the bill on the faith thereof (Id.); and no damages can be recovered on paper containing a waiver of protest, if it be agreed to be paid at any other place than that on which it is drawn, or by any other person than the drawer or maker (Id.). LOUISIANA: 10 per cent. on bills drawn on foreign countries, and 5 per cent. on any of the United States, in lieu of protest fees and other charges and interest before protest (Rev. St. §§ 320, 321); and on protested circulating notes, 12 per cent. damages, in lieu of interest until judgment (Id. § 1886). MAINE: On protested bills for more than \$100, payable in Maine at a distance of 75 miles, 1 per cent., and, if payable in any other state or territory, 3, 6, or 9 per cent., according to locality (Rev. St. c. 82, § 42); interest being also recoverable. *Orono Bank v. Wood*, 49 Me. 26. MARYLAND: 15 per cent. on protested bills drawn on any foreign country, and 8 per cent. on other of the United States, besides re-exchange and costs of protest (Pub. Gen. Laws, art. 13, §§ 1, 4); and any indorser of a foreign bill may recover damages paid, with legal interest, from any prior party (Id. § 2). MASSACHUSETTS: 1 per cent. on notes for \$100 or more, payable in Massachusetts at a distance of more than 75 miles (Pub. St. c. 77, § 21); 2, 3, 4, or 5 per cent., according to locality, on bills payable in any other of the United States (Id. § 20); and 5 per cent. on bills payable beyond the United States, against any party liable, besides re-exchange, and in lieu of other charges and expenses (Id. § 18). MICHIGAN: Against any party liable, on protested bills, payable in any other of the United States, 3, 5, and 10 per cent., according to locality; and, out of the United States, 5 per cent., besides re-exchange, and in lieu of other charges and expenses (How. Ann. St. §§ 1584, 1585). MINNESOTA: On bills payable without the limits of the United States, 10 per cent., besides re-exchange, in lieu of other charges and expenses; on bills payable in other of the United States, 5 per cent. and legal interest, according to its tenor, and costs of protest (Gen. St. §§ 2234, 2235).

⁴⁸⁰ 2 Daniel, Neg. Inst. 446; 1 Pars. Notes & B. 662; *Allen v. Bank*, 5 Whart. (Pa.) 420; *Lennig v. Ralston*, 23 Pa. St. 137; *Bangor Bank v. Hook*, 5 Me. 174.

Party Entitled to Damages.

§ 1721. The damages recovered on a protested bill belong to the party at whose risk and cost the bill was remitted.⁴⁸¹ If the bill

MISSISSIPPI: 10 per cent. on protested bills on foreign countries, and 5 per cent. on any other of the United States, besides interest, costs, and charges (Ann. Code, § 3506); but no damages shall accrue on inland bills protested, although they must be protested if over \$20 (Id. § 3507). **MISSOURI:** In favor of holders for value only and against drawer, indorser, and acceptor, 4 per cent. on protested bills "for value," drawn, indorsed, or accepted, payable in Missouri; 10 per cent. in other of the United States, and 20 per cent. in any foreign place, in lieu of other charges and protest fees (Rev. St. §§ 725-730); unless paid within 20 days after demand or notice (Id. § 729); but not on negotiable notes to order of fictitious person or maker purchased from the maker (Id. § 735). To be computed on the principal sum only. *Barnes v. McMullins*, 78 Mo. 260. **NEBRASKA:** 12 per cent. on persons without the United States, and 6 per cent. on other of the United States (Comp. St. § 3386). **NEVADA:** In favor of holder for value only, on protested bills drawn on persons east of the Rocky Mountains, 15 per cent.; and, on foreign countries, 20 per cent., besides interest after notice (Gen. St. §§ 4892, 4893). **NEW YORK:** In favor of holder for value only of bills drawn on persons in the New England or Middle states, Ohio, Maryland, Virginia, or District of Columbia, 3 per cent.; in North Carolina, South Carolina, Georgia, Kentucky, or Tennessee, 5 per cent.; and, elsewhere out of New York, 10 per cent., in lieu of interest, protest fees, and charges before protest (1 Rev. St. p. 770, §§ 18, 23). Damages may also be recovered against one who promises to accept (Id. 768, § 10). **NORTH CAROLINA:** On bills drawn on any other of the United States, 3 per cent., and, on foreign places, 10 per cent. (Code, § 48). **OREGON:** On bills payable without the United States, 10 per cent damages, besides re-exchange, in lieu of other charges; and, on any other of the United States, 5 per cent. and costs and charges of protest (Hill's Ann. Laws, §§ 3195, 3196). **PENNSYLVANIA:** On bills drawn on other of the United States and on foreign countries, 5, 10, 15, or 20 per cent., according to locality, besides re-exchange and charges of protest, and in lieu of other charges (Brightly's Purd. Dig. p. 221, § 7). **RHODE ISLAND:** On protested foreign bills, 10 per cent. and charges of protest (Pub. St. c. 166, § 1); and, on protested inland bills, 5 per cent. and charges of protest (Id. § 3). **SOUTH CAROLINA:** On bills on places out of the state, 10, 12, or 15 per cent., according to locality, besides all charges incidental thereto, and interest until paid (Rev. St. § 1401); but the drawer is liable only on protest and notice, made within 14 days, in case of nonacceptance, or of acceptance and nonpayment for three days after maturity (Id. § 1395). **TENNESSEE:** On protested bills drawn

⁴⁸¹ *Keppeler v. Carr*, 4 Dall. 155.

is protested for nonacceptance, and taken up by an indorser, he cannot recover damages against the drawer, unless he is himself liable for them.⁴⁸² And, if it is taken up by the indorser's agent, he cannot recover the statutory damages against his principal.⁴⁸³ So, where a foreign bill is transmitted to a correspondent abroad for collection, the correspondent cannot recover damages against his principal, although the principal is indebted to him and bankrupt.⁴⁸⁴ But one who takes up a bill for the drawer's honor is entitled to recover statutory damages against him.⁴⁸⁵ This does not apply, however, to one who holds a bill merely as collateral for other security of a higher character, such as a bottomry bond.⁴⁸⁶

Party Liable for Damages.

§ 1722. The government is liable for statutory damages as the drawer of a foreign bill.⁴⁸⁷

But an acceptor is liable, in general, only for interest and costs, and not for damages.⁴⁸⁸ Where, however, the drawer is obliged to on other of the United States, 3 per cent.; and, on foreign countries, 15 or 20 per cent., according to locality, besides charges of protest, in lieu of interest and other charges (Code, §§ 3512, 3513). TEXAS: On protested bills drawn by a merchant of Texas on his agent living outside of Texas, 10 per cent., with interest (Rev. St. art. 317). VIRGINIA and WEST VIRGINIA: On bills drawn on any other of the United States, 3 per cent.; and, on any place without the United States, 10 per cent. "In addition to what else he is liable for" (Virginia Code, § 2851; West Virginia Code, c. 99, § 9). WISCONSIN: 5 per cent. on protested bills payable out of the United States, besides re-exchange (Sanb. & B. Ann. St. § 1682); and 5 per cent. on bills drawn on any other of the United States, with the costs and charges of protest (Id. § 1683).

⁴⁸² *Kingston v. Wilson*, 4 Wash. C. C. 310, Fed. Cas. No. 7,823.

⁴⁸³ *Thompson v. Robertson*, 4 Johns. 27; *Kenworthy v. Hopkins*, 1 Johns. Cas. (N. Y.) 107.

⁴⁸⁴ *Hambro v. Casey*, 110 U. S. 216, 3 Sup. Ct. 583.

⁴⁸⁵ *Pratalongo v. Larco*, 47 Cal. 378. But payment by the drawer for the honor of the drawee will not render the latter liable for damage, other than the actual damages sustained by the drawer. *City Bank v. Girard Bank*, 10 La. 562.

⁴⁸⁶ *Hazelhurst v. Kean*, 4 Yeates (Pa.) 19.

⁴⁸⁷ *United States Bank v. U. S.*, 2 How. 711. But a draft by one government on another is not a bill of exchange, or within the terms of the Maryland statute as to protest and damages. *U. S. v. Bank of U. S.*, 5 How. 382.

⁴⁸⁸ *Bowen v. Stoddard*, 10 Metc. (Mass.) 375; *Manning v. Kohn*, 44 Ala. 343; (2445)

pay a bill with statutory damages, he may prove against the acceptor's estate in bankruptcy for the whole amount paid.⁴⁸⁹ Where an indorser sues the acceptor of a bill, he cannot recover the damages incurred by him at suit of his indorsee without a count in his declaration for money paid.⁴⁹⁰ But, if a principal orders his agent to purchase goods and draw on him for the price, he will be liable on dishonor of the bill for damages under the common counts.⁴⁹¹

Where one promises to accept a bill for the drawer's accommodation, he will be liable to him for damages, but only to the extent of the inconvenience and loss suffered, and not for the face of the bill.⁴⁹² A bank is liable to its customer for failure to pay a check drawn upon it within a reasonable time after receiving funds, without proof of actual damage sustained by the drawer.⁴⁹³ And substantial damages are recoverable in such case,⁴⁹⁴ although, as we have seen, the payee cannot recover against the drawee upon such check, and is not entitled to damages for its nonpayment.

Damages—When Recoverable.

§ 1723. The drawer of an interstate bill is, in general, liable for statutory damages.⁴⁹⁵ So, where a bill is drawn in Ohio on a firm residing in Ohio and Louisiana, but is addressed to, and accepted as payable in, Louisiana, the drawer will be liable for damages as on

Trammell v. Hudmon, 56 Ala. 235; *Hanrick v. Bank*, 8 Port. (Ala.) 539. Nor under the statute of another state where the bill was drawn. *Fiske v. Foster*, 10 Metc. (Mass.) 597.

⁴⁸⁹ *Francis v. Rucker*, Amb. 672.

⁴⁹⁰ *King v. Phillips*, Pet. C. C. 350, Fed. Cas. No. 7,802. But the damages need not be specially demanded in the declaration. *McGarr v. Lloyd*, 3 Pa. St. 474.

⁴⁹¹ *Riggs v. Lindsay*, 7 Cranch. 500.

⁴⁹² *Ilsley v. Jones*, 12 Gray (Mass.) 260.

⁴⁹³ *Marzetti v. Williams*, 1 Barn. & Adol. 415.

⁴⁹⁴ *Rolin v. Steward*, 14 C. B. 595.

⁴⁹⁵ *May v. Bank*, 9 Ind. 233; *State Bank v. Bowers*, 8 Blackf. (Ind.) 73. But not where it is only held as an additional security. *Hazelhurst v. Kean*, 4 Yeates (Pa.) 19. And this was so under the former Kentucky statute. *Wood v. Bank*, 7 T. B. Mon. (Ky.) 281, although not by the present act. But such damages once paid by mistake of law cannot be recovered or set off. *Bank of U. S. v. Daniel*, 12 Pet. 32.

a foreign bill.⁴⁹⁶ But a distinction is sometimes made between bills drawn on another state and bills payable in such other state, to the effect that no damages can be recovered in the latter case.⁴⁹⁷ But this distinction has been denied, and is probably unsound,⁴⁹⁸ except under the terms of some special statutes. Where a bill drawn and payable in New York is indorsed in Ohio, the indorser will be liable for damages.⁴⁹⁹ In Missouri, statutory damages are only recoverable on bills which are drawn expressly "for value received";⁵⁰⁰ and the note must not only be negotiable, but must have been negotiated.⁵⁰¹ The indorser of a negotiable note, payable in another state, and protested for nonpayment, is liable for damages by the Georgia statute.⁵⁰² But, in the absence of a statute, damages are not recoverable on such a note,⁵⁰³ or on a certificate of deposit,⁵⁰⁴ or a nonnegotiable note.⁵⁰⁵ But, where one draws a bill on himself (which is, in effect, a note), it has been held that he is liable for damages on its dishonor.⁵⁰⁶

Damages on Protest.

§ 1724. The drawer is liable for statutory damages on the protest of a bill for nonacceptance.⁵⁰⁷ And this is true of inland bills, also, in most of the United States.⁵⁰⁸ But if a joint drawer voluntarily and unnecessarily pays damages on protest of the bill for nonaccept-

⁴⁹⁶ *West v. Bank*, 6 Ohio St. 168.

⁴⁹⁷ *Clay v. Hopkins*, 3 A. K. Marsh. (Ky.) 485; *Farmers' Bank of Canton v. Brainerd*, 8 Ohio 292; *Cox v. Bank*, 3 Sneed (Tenn.) 140.

⁴⁹⁸ *State Bank of Indiana v. Rodgers*, 3 Ind. 53.

⁴⁹⁹ *Case v. Heffner*, 10 Ohio, 180.

⁵⁰⁰ *Hallowell v. Page*, 24 Mo. 590; *Riggs v. City of St. Louis*, 7 Mo. 438.

⁵⁰¹ *Broadway Sav. Bank v. Forbes*, 79 Mo. 226, 9 Mo. App. 575; *Bank of Missouri v. Wright*, 10 Mo. 719. And only by a holder for value, who need not, however, aver himself to be such. *Clark v. Schneider*, 17 Mo. 295.

⁵⁰² *Howard v. Bank*, 3 Ga. 375.

⁵⁰³ *Loud v. Merrill*, 47 Me. 351.

⁵⁰⁴ *Sawyer v. Page*, 24 Mo. 595.

⁵⁰⁵ *Perry v. Smith*, 22 Vt. 301. So, a bill payable "in currency." *Farwell v. Kennett*, 7 Mo. 595.

⁵⁰⁶ *Randolph v. Parish*, 9 Port. (Ala.) 76. But see, contra, *McCandlish v. Cruger*, 2 Bay (S. C.) 377.

⁵⁰⁷ *Gantt v. Mackenzie*, 3 Camp. 51.

⁵⁰⁸ *Evans v. Gee*, 11 Pet. 80, on an Alabama bill.

ance, without waiting for protest for nonpayment, he is not entitled to contribution as to such damages against his co-drawer.⁵⁰⁹

Protest is generally necessary in order to render the drawer liable for the statutory damages.⁵¹⁰ And this is true of interstate bills, although they need not otherwise be protested.⁵¹¹ If, however, the protest is unavailing and unnecessary, there can be no such damages recovered.⁵¹² On the other hand, the acceptance in Missouri of a bill drawn in another state for "value received" renders the acceptor liable for 10 per cent. damages without protest.⁵¹³ And, where a foreign bill is protested only as to part of the amount, damages are to be reckoned only on such part.⁵¹⁴ In Indiana, where the statute formerly required a preliminary demand of payment, notice of protest given to the drawer was held to be a sufficient demand to render him liable for damages.⁵¹⁵

Waiver of Damages.

§ 1725. Where the holder of a bill receives payment after maturity, although he may afterwards recover interest which has been reserved, he will be held to have waived his statutory damages not then demanded or reserved.⁵¹⁶ So, if the second part of a bill is presented and paid, with interest and protest fees, after dishonor of the first part, it will be a waiver of the damages on the first part.⁵¹⁷ And, if a drawer who has become liable for damages is released on giving his check for the amount of the bill, it will be a sufficient consideration for the release; and he can afterwards recover the face of

⁵⁰⁹ *Morris v. Tarin*, 1 Dall. 147.

⁵¹⁰ *Case v. Heffner*, 10 Ohio, 180; and must be averred in the declaration, *Jordan v. Bell*, 8 Port. (Ala.) 53. And see § 1144, *supra*.

⁵¹¹ *McMurchey v. Robinson*, 10 Ohio, 496; *Wanzer v. Tupper*, 8 How. (Miss.) 234.

⁵¹² *Noyes v. White*, 9 Kan. 640. On the other hand, the holder who unnecessarily protests a bill is not in general liable for damages therefor to the drawer, *Wittich v. Bank*, 20 Fla. 843; or drawee, *Bellinger v. Glenn*, 80 Ala. 190.

⁵¹³ *Phillips v. Evans*, 64 Mo. 17.

⁵¹⁴ *Laing v. Barclay*, 3 Starkie, 38.

⁵¹⁵ *May v. Bank*, 9 Ind. 233.

⁵¹⁶ *United States v. Gurney*, 4 Cranch, 333. But see, *contra*, as to damages, *Kennerly v. Bragg*, 1 Mo. App. 574.

⁵¹⁷ *Page v. Warner*, 4 Cal. 395.

the bill against the holder, who collected it from the acceptor, without deduction of the damages for which he was originally liable.⁵¹⁸ So, in Missouri, under the statute which gave damages on promissory notes, if not paid in 20 days after demand and notice, damages cannot be recovered in a suit brought within the 20 days.⁵¹⁹

The drawer and indorser of a bill are no longer liable for damages, after the bill has been collected by a levy against the acceptor.⁵²⁰ And in Maine a part payment made by the acceptor is available to reduce the damages chargeable against the indorser.⁵²¹ But in New York the drawer remains liable for the statutory damages, notwithstanding a part payment made by the foreign acceptor after the bill is dishonored, and wherever such payment may have been made.⁵²²

Measure of Damages.

§ 1726. Irrespective of statutory damages, the face of a bill, including principal and interest due on it, is the measure of the damages recoverable by the holder. Thus, one who purchases at a discount may recover the face of the check from the drawer,⁵²³ or of the note, from the maker;⁵²⁴ or prove the note for its full amount against the maker in bankruptcy.⁵²⁵ But, where it is shown that a note was given for indemnity against a contingent loss, the damages recoverable between immediate parties will be limited to the actual amount of such loss.⁵²⁶ So, where a premium note is given to cover risks to be afterwards indorsed on an open insurance policy, the amount due at any time would be represented by the premiums

⁵¹⁸ *Pesant v. Pickersgill*, 56 N. Y. 650.

⁵¹⁹ Rev. St. p. 295, § 11; *Farrell v. Fritschle*, 30 Mo. 190.

⁵²⁰ *Warren v. Coombs*, 20 Me. 139.

⁵²¹ *Bangor Bank v. Hook*, 5 Me. 174.

⁵²² *Hargous v. Lahens*, 3 Sandf. 213.

⁵²³ *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44.

⁵²⁴ *Wade v. Railway Co.*, 149 U. S. 327, 13 Sup. Ct. 892; *St. Louis, Ft. S. & W. R. Co. v. Chenault*, 36 Kan. 51, 12 Pac. 303; *Petri v. Bank*, 83 Tex. 424, 18 S. W. 752; *Id.*, 84 Tex. 212, 20 S. W. 777. And see § 448, *supra*.

⁵²⁵ *Ex parte Lee*, 1 P. Wms. 782.

⁵²⁶ *Rogers v. Smith*, 47 N. Y. 324; *Colman v. Post*, 10 Mich. 422. And see *Puterbaugh v. Hammond*, 106 Ill. 257.

then actually earned.⁵²⁷ And it has been held that, if only part of the amount due on a note is recovered by mistake, such recovery will be no bar to a recovery of the balance due, even without a special averment of the mistake.⁵²⁸

But an accommodation indorser is liable to one who purchased at a discount from the payee only for the amount actually paid by him,⁵²⁹ although he would be liable to a bona fide purchaser in due course of business for the face of the note, irrespective of the price paid.⁵³⁰ An indorsee is, however, entitled to recover against his immediate indorser only the amount actually paid.⁵³¹ But, although the indorser may prove what he received, the face of the note is presumptive evidence of the amount recoverable.⁵³² And, where an indorser's liability is conditioned on immediate suit against the maker, the judgment rendered against the maker is the measure of damages recoverable against the indorser.⁵³³

As against prior and remote parties interposing a substantial defense, the protection of a bona fide holder, and his right to recovery, extend only to the consideration paid by him, with interest,⁵³⁴ and statutory damages and costs, if any.

But even in such case the face of the note has been held to be,

⁵²⁷ *Maine Mut. Marine Ins. Co. v. Farrar*, 66 Me. 133; *Same v. Stockwell*, 67 Me. 382.

⁵²⁸ *Conklin v. Field*, 37 How. Prac. (N. Y.) 455.

⁵²⁹ *Cook v. Clark*, 4 E. D. Smith (N. Y.) 213.

⁵³⁰ *Ingalls v. Lee*, 9 Barb. (N. Y.) 647.

⁵³¹ *Braman v. Hess*, 13 Johns. (N. Y.) 52; *Munn v. Commission Co.*, 13 Johns. (N. Y.) 44; *Aldrich v. Jackson*, 5 R. I. 218; *In re Many*, 17 N. B. R. 514, Fed. Cas. No. 9,054; *Muldrow v. Agnew*, 11 Mo. 616; *Cook v. Cockrill*, 1 Stew. (Ala.) 475; *Faulkner v. White*, 33 Neb. 199, 49 N. W. 1122. So, upon the indorsement of a nonnegotiable note. *Felton v. Smith*, 88 Ind. 149; *Whisler v. Bragg*, 31 Mo. 124. In KENTUCKY the consideration for an assignment must always be averred, and only the consideration paid shall be recovered (Ky. St. § 475).

⁵³² *Foust v. Gregg*, 68 Ind. 399; *Schmied v. Frank*, 86 Ind. 250. But the indorser's liability will not be limited to damages for false representation. *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498.

⁵³³ *Watson v. Hahn*, 1 Colo. 386.

⁵³⁴ See §§ 452, 904, supra: *De Kay v. Water Co.*, 38 N. J. Eq. 158; *Hyman v. Forge Co.*, 18 Misc. Rep. 381, 41 N. Y. Supp. 655.

prima facie, the amount due, and the burden is on the maker to show that the holder purchased the note for less.⁵³⁵

Recovery of Costs.

§ 1727. An indorser who takes up a bill, and brings his suit against prior parties, is not entitled to recover the costs of a needless defense made by him before paying the bill.⁵³⁶ In like manner, an accommodation acceptor cannot recover against the drawer, whom he accommodated, the costs paid by him in defending needlessly an action brought by the holder,⁵³⁷ although the drawer has pledged the bill, and his pledgee has fraudulently transferred it to a bona fide purchaser after payment of the debt secured.⁵³⁸ Where the holder of a note has brought suit against the maker which has been defeated by the defense of usury, he may still recover on the note against his indorser; but such recovery will not include the costs incurred in the action against the maker.⁵³⁹

Damages against Surety—Guarantor.

§ 1728. One who signs a note as surety is liable to a purchaser from the payee only for the amount actually paid by him.⁵⁴⁰ But

⁵³⁵ *Carpenter v. Bank*, 119 Ill. 352, 10 N. E. 18.

⁵³⁶ *Byles, Bills*, 411; 2 *Daniel, Neg. Inst.* 465; 2 *Pars. Notes & B.* 458; *Dawson v. Morgan*, 9 *Barn. & C.* 618; *Peers v. Kirkham*, 46 *Mo.* 146; *Fenn v. Dugdale*, 31 *Mo.* 580; *Simpson v. Griffin*, 9 *Johns. (N. Y.)* 131; *Buffalow v. Pipkin*, 47 *N. C.* 130; *Steele v. Sawyer*, 2 *McCord (S. C.)* 459; or of sale suffered on execution against him, *March v. Barnet*, 114 *Cal.* 375, 46 *Pac.* 152. Especially where he had given his own note, and afterwards made defense against a bona fide holder, on the ground that the original note was forged. *Whitney v. Bank*, 45 *N. Y.* 303.

⁵³⁷ *Byles, Bills*, 412; *Benj. Chalm. Dig. art.* 229; 2 *Daniel, Neg. Inst.* 465; 2 *Pars. Notes & B.* 663; *Beech v. Jones*, 5 *C. B.* 696; *Bagnall v. Andrews*, 7 *Bing.* 217, 4 *Moore & P.* 839. But it is otherwise where he defended the action at the drawer's request. *Garrard v. Cottrell*, 10 *Q. B.* 679; *Stratton v. Mathews*, 3 *Exch.* 48.

⁵³⁸ *Roach v. Thompson*, 4 *Car. & P.* 194.

⁵³⁹ *Copp v. McDugall*, 9 *Mass.* 1. But see. contra, where the maker's defense was that the note had been forged, *Whitney v. Bank*, 45 *N. Y.* 303.

⁵⁴⁰ *Cobb v. Titus*, 10 *N. Y.* 198. This is true also of an accommodation in-

a guarantor is liable to a bona fide holder for the value of a good bill for the same amount as that which was dishonored, although the guarantied bill was valued at a large discount in the market where it was drawn.⁵⁴¹ And, where one guaranties that there is a certain amount due and unpaid upon a note, he will be liable for the amount due at the beginning of the suit.⁵⁴² And, in general, a guarantor of payment is liable for the amount of the note guarantied, and not merely for the consideration received by him.⁵⁴³

Damages Recoverable by Indorser—Surety.

§ 1729. Where a note is paid at maturity by an indorser in depreciated bills, and he afterwards transfers it to the plaintiff, the recovery against a prior indorser will be limited to the amount actually paid in taking up the bill.⁵⁴⁴ So, a surety who pays a bill can only recover from his principal the amount actually paid by him.⁵⁴⁵ And, if he has obtained his discharge by giving up a note made by the principal, his recovery against the principal will be limited to the face value of such note.⁵⁴⁶ But, if the guarantor takes up a bill by paying the amount loaned on it, he may recover from the acceptor the face of the bill, although as to the balance he may be only trustee for another owner.⁵⁴⁷ And an accommodation indorser, taking up a note at maturity, may recover, as payee, against the maker whom he accommodated, the entire face of the note, irrespective of the amount paid by him.⁵⁴⁸ If an indorser takes up a draft by payment or security given to his indorsee, he may recover against the acceptor the same amount that would have been recovered by his indorsee, without regard to the amount actually paid

dorser at suit of one who is not a bona fide purchaser for value. *Bramhall v. Bank*, 36 N. J. Law, 243.

⁵⁴¹ *Delegal v. Naylor*, 7 Bing. 460.

⁵⁴² *Head v. Green*, 5 Biss. 311, Fed. Cas. No. 6,292.

⁵⁴³ *Cooper v. Page*, 24 Me. 73.

⁵⁴⁴ *Bethune v. McCrary*, 8 Ga. 114.

⁵⁴⁵ *McLaughlin v. Rintels*, 64 N. C. 634; or the dividend actually paid by his insolvent estate, *In re Sterling*, 1 Fed. 167.

⁵⁴⁶ *Barber v. Gillson*, 18 Nev. 89, 1 Pac. 452.

⁵⁴⁷ *Reid v. Furnival*, 1 Crompt. & M. 538, 5 Car. & P. 499.

⁵⁴⁸ Even though he has only paid one-half of the face of the note. *Fowler v. Strickland*, 107 Mass. 552.

to him.⁵⁴⁹ But one who purchases a bill from the drawer by indorsement after maturity can only recover from the acceptor the amount actually due by the acceptor to the drawer at the maturity of the bill.⁵⁵⁰

Partial Dividends.

§ 1730. A dividend received by the holder from the drawer's estate must be deducted from the proof made by him against the bankrupt acceptor.⁵⁵¹ So, dividends received from the principal's estate must be deducted before proof against the surety.⁵⁵²

And, in like manner, dividends from the acceptor's estate must be deducted before proof is made against the drawer,⁵⁵³ unless they have been paid out of the drawer's funds in the acceptor's hands.⁵⁵⁴ The holder of a bill may, however, prove for the whole amount against both drawer and acceptor, and receive dividends on such amount until the entire bill is paid.⁵⁵⁵ But, where part of a note has been paid by the accommodation maker, the holder can only prove against the indorsers for the balance remaining due, and cannot receive dividends on such proofs against several indorsers, amounting in all to more than that sum.⁵⁵⁶ And when the amount of a second dividend exceeds the balance due on the claim as proved, although less than the accrued interest, such excess cannot be received by the holder

⁵⁴⁹ *Deas v. Harvie*, 2 Barb. Ch. (N. Y.) 448.

⁵⁵⁰ *Adams v. Oakes*, 6 Car. & P. 70.

⁵⁵¹ *Ex parte Tayler*, 1 De Gex & J. 302; *In re Oriental Commercial Bank*, L. R. 6 Eq. 582. So, dividends from drawer and indorser. *Ex parte Leers*, 6 Ves. 644.

⁵⁵² *Lowell v. French*, 54 Vt. 193. But, before dividends paid, proof may be made against each estate for the full amount, *Ragsdale v. Bank* (S. C.) 23 S. E. 947; and the entire claim may be proved against the insolvent estates of two joint makers, *Roger Williams Nat. Bank v. Hall*, 160 Mass. 171, 35 N. E. 606; or against the estate of a single debtor without deduction for collaterals still held, *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 153, 50 Fed. 372, reversing 50 Fed. 798. But double proof cannot be made against an indorser's estate on his original indorsement and his indorsement of a second note as collateral for the first. *In re Sherry* (Wis.) 76 N. W. 611.

⁵⁵³ *Ex parte Royal Bank*, 2 Rose, 197.

⁵⁵⁴ *Ex parte Ryswicke*, 2 P. Wms. 89.

⁵⁵⁵ *Ex parte Wyldman*, 2 Ves. Sr. 115.

⁵⁵⁶ *In re Howard*, 4 N. B. R. 571, Fed. Cas. No. 6,750.

until other creditors have received the full amount proved by them.⁵⁵⁷

Damages Recoverable by Pledgee.

§ 1731. Where suit is brought by the pledgee of a bill, his recovery should, as against good defenses, be limited to the amount actually due and secured to him;⁵⁵⁸ e. g. to actual advances, where the note is made to secure advances.⁵⁵⁹ But, where a mortgage secures a negotiable note, the recovery will not be limited, as in the case of a bond, to the amount actually due from the mortgagor to the mortgagee.⁵⁶⁰ Where notes are pledged to secure a debt, and are surrendered without authority to the maker on his payment of the debt, the pledgor may recover the balance due on the notes, of which their face value is prima facie evidence.⁵⁶¹ But the pledgee may recover the entire amount due on a note, although it exceeds the debt secured, the balance being subject to any defense available against the payee.⁵⁶²

Where he holds it as indemnity against an acceptance given by him, he can only recover against the maker of the note, who has purchased the pledgor's equity in it, the amount actually paid by him on the acceptance, and such commissions as were agreed on, with interest and costs.⁵⁶³ And where a broker, holding a note for sale, pledges it fraudulently for a loan to himself, and it is sold by the pledgee without notice, the owner may recover from the pledgee the difference between the debt secured and the face of the note.⁵⁶⁴

⁵⁵⁷ *Blake v. Ames*, 8 Allen (Mass.) 318.

⁵⁵⁸ *Bell v. Bean*, 75 Cal. 86, 16 Pac. 521; *Brown v. Callaway*, 41 Ark. 418; *Id.* 391; *Hatcher v. Bank*, 79 Ga. 547, 5 S. E. 111; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95, 48 N. W. 526; *Haydon v. Nicoletti*, 18 Nev. 290, 3 Pac. 473; *Continental Nat. Bank v. Bell*, 125 N. Y. 38, 25 N. E. 1070; *Handy v. Sibley*, 46 Ohio St. 9, 17 N. E. 329; *Memphis Bethel v. Continental Nat. Bank* (Tenn.) 45 S. W. 1072; *Wright v. Hardie*, 88 Tex. 653, 32 S. W. 885. And see § 797, *supra*.

⁵⁵⁹ *Vogan v. Caminetti*, 65 Cal. 438, 4 Pac. 435.

⁵⁶⁰ *Croft v. Bunster*, 9 Wis. 503.

⁵⁶¹ *Union Trust Co. v. Rigdon*, 93 Ill. 458.

⁵⁶² *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Barmby v. Wolfe*, 44 Neb. 77, 62 N. W. 318.

⁵⁶³ *Warren v. Emerson*, 1 Curt. 239, Fed. Cas. No. 17,195.

⁵⁶⁴ *Davis v. Funk*, 39 Pa. St. 243.

So, where a pledgee makes proof against a bankrupt maker, the balance over and above the amount secured by the pledge will be subject to such equities as would be available against the pledgor.⁵⁶⁵ And in a suit against an accommodation maker the pledgee can only recover the amount actually due and secured to him.⁵⁶⁶ So, where his suit is against an accommodation indorser, and the note has been diverted from its original purpose.⁵⁶⁷ One who takes a bill by pledge from a drawer, who has been accommodated, may prove against the bankrupt estate of the accommodation acceptor for the face of the bill, although he will not be entitled to any dividend over and above the debt secured.⁵⁶⁸ If a note is held as collateral, and the debt secured is satisfied in whole or in part, the burden is on the defendant to show that fact.⁵⁶⁹

Damages in Trover—Negligence—Fraud.

§ 1732. In an action of trover the damages recoverable are the amount due on the bill, with interest.⁵⁷⁰ But, although the face of the note is *prima facie* the measure of damages in such action, the insolvency of the maker and reduced value of the note may be shown in mitigation of damages.⁵⁷¹ So, if the maker destroys a note that

⁵⁶⁵ *Ex parte Kelty*, 1 Low. 394, Fed. Cas. No. 7,681.

⁵⁶⁶ *Hilton v. Smith*, 5 Gray (Mass.) 400; *Atlas Bank v. Doyle*, 9 R. I. 76.

⁵⁶⁷ *Williams v. Smith*, 2 Hill (N. Y.) 301.

⁵⁶⁸ *Ex parte Newton*, 16 Ch. Div. 330.

⁵⁶⁹ *Hancock v. Hodgson*, 4 Ill. 329.

⁵⁷⁰ *Robbins v. Packard*, 31 Vt. 570; *Thayer v. Manley*, 73 N. Y. 305; *Griggs v. Day*, 136 N. Y. 152, 32 N. E. 612; *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806. And this will include interest on coupons maturing before judgment. *City of Winona v. Minnesota Ry. Const. Co.*, 29 Minn. 68, 11 N. W. 228. If it is payable in cotton or grain, the value of the merchandise is the measure of damages. *Bell v. G. Ober & Sons Co.*, 96 Ga. 214, 23 S. E. 7; *Canadian Bank of Commerce v. McCrea*, 106 Ill. 281. And see § 1684, *supra*.

⁵⁷¹ *McPeters v. Phillips*, 46 Ala. 496; *Callahan v. Brown*, 31 Iowa, 333; *Western R. Co. v. Bayne*, 75 N. Y. 1, affirming 11 Hun (N. Y.) 166. "The defendant has the right to show in reduction the fact of payment in whole or in part, the inability of the makers to pay wholly or partially, a release of the makers from their undertaking, the invalidity of the note, or other matter which will legitimately affect and diminish its value." *Folger, J., in Booth v. Powers*, 56 N. Y. 22, reversing 59 Barb. (N. Y.) 331.

is outlawed, the damages recoverable for the conversion will amount to the face of the note, unless the statute of limitations is set up by the defendant.⁵⁷²

A collection agent is liable for negligence to the amount of the note and interest, where it has become worthless by the maker's failure.⁵⁷³ But the actual value of the note at the time of the negligence is the measure of his liability.⁵⁷⁴ If he neglects to present a bill properly for acceptance, he will be liable *prima facie* for the amount of the bill, but evidence is admissible in mitigation of damages.⁵⁷⁵ So, in an action for damages against a notary, the amount of the note is recoverable, but not the costs incurred by the holder in an unsuccessful suit against the indorser, who was discharged by the notary's negligence.⁵⁷⁶

Where suit is brought against an assignor for the fraudulent assignment of a note which had been already paid, the assignee may recover *prima facie* the amount due on the note, or he may bring suit for the original consideration paid by him.⁵⁷⁷ If suit is brought against a pledgee who sells collateral without authority, the damages recoverable will be the value of the collateral, and this is presumptively its face value.⁵⁷⁸ So, if an accommodation note is fraudulently diverted by the payee, and discounted to a bona fide holder, and paid to him by the maker, the maker may recover the whole face value from the payee on the strength of his liability alone, without alleging its payment.⁵⁷⁹ And, if suit is brought for the non-performance of a contract to sell a note, the value of the note at the time fixed for its delivery will be the measure of damages.⁵⁸⁰

⁵⁷² *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130.

⁵⁷³ *Knapp v. Express Co.*, 55 N. H. 348; *Merchants' State Bank v. State Bank of Phillips*, 94 Wis. 444, 69 N. W. 170.

⁵⁷⁴ *Mitchell v. Shuert*, 16 Mich. 444; *West v. Bank*, 54 Minn. 466, 56 N. W. 54; *Povall v. Manufacturing Co.*, 59 Hun, 70, 12 N. Y. Supp. 653; *Fox v. Bank*, 73 Iowa, 649, 35 N. W. 688.

⁵⁷⁵ *Allen v. Suydam*, 20 Wend. (N. Y.) 321.

⁵⁷⁶ *Downer v. Bank*, 6 Hill (N. Y.) 648.

⁵⁷⁷ *Neff v. Clute*, 12 Barb. (N. Y.) 469.

⁵⁷⁸ *Hazzard v. Duke*, 64 Ind. 220.

⁵⁷⁹ *Decker v. Mathews*, 12 N. Y. 313.

⁵⁸⁰ *Smith v. Dunlap*, 12 Ill. 184.

Damages—In What Currency.

§ 1733. Where a bill is payable in foreign money, its value is determined by the rate of exchange at the time of trial.⁵⁸¹ The value of a bill payable in the United States in pounds sterling is at the rate fixed by act of congress.⁵⁸²

But, where a note is for "dollars," it will be presumed that legal dollars are intended, and judgment will be rendered for the face of the note, without inquiry as to the value of the currency intended.⁵⁸³ If, however, it is payable "in legal-tender greenback money," with a provision that, if it depreciates, it is to be made good at a definite rate named, judgment will be recovered "for the amount in currency which the plaintiff elected to receive."⁵⁸⁴ If a note is payable expressly in a depreciated currency, the damages recoverable will be the value of such currency at the time of making the note.⁵⁸⁵ Thus, the value of a note for "\$125 Texas money at current price in New Orleans" may be fixed by the jury on parol evidence.⁵⁸⁶ So, where a bill is payable in "current bank notes," the damages recoverable will be the value of such notes.⁵⁸⁷ If "in Georgia or Alabama bank notes," the maker will be liable for the value of such notes as it is most for his interest to pay.⁵⁸⁸ If in commercial paper of a certain character, the damages will be the value of such paper at the time it should have been given.⁵⁸⁹ But a condition that a note may

⁵⁸¹ *Lee v. Wilcocks*, 5 Serg. & R. (Pa.) 48.

⁵⁸² *Cary v. Courtenay*, 103 Mass. 316.

⁵⁸³ *Petty v. Fleishel*, 31 Tex. 169. So, where the promise is to pay "in the currency then in circulation an amount equivalent to \$—— of the currency now in circulation, as it is valued at this date." *Whitaker v. Dye*, 56 Ga. 380. As to the amount of damages under the United States legal tender act, where the paper is payable in gold or gold coin, see § 98, *supra*.

⁵⁸⁴ *Ledford v. Smith*, 6 Bush (Ky.) 129.

⁵⁸⁵ *Walker v. Meek*, 12 Smedes & M. (Miss.) 495; *Farwell v. Kennett*, 7 Mo. 595; *Chevallier v. Buford*, 1 Tex. 503.

⁵⁸⁶ *Roberts v. Short*, 1 Tex. 373.

⁵⁸⁷ *McDowell v. Keller*, 4 Cold. (Tenn.) 258; *Coffin v. Hill*, 1 Helsk. (Tenn.) 385; *Moore v. Gooch*, 6 Helsk. (Tenn.) 104; *Hopson v. Fountain*, 5 Humph. (Tenn.) 140; *Jones v. Kincaid*, 5 Lea (Tenn.) 677.

⁵⁸⁸ *Hixon v. Hixon*, 7 Humph. (Tenn.) 33.

⁵⁸⁹ *Robinson v. Noble*, 8 Pet. (U. S.) 181.

be paid in notes of solvent makers relates to, and expires at the time of, its maturity; and suit may be brought for the amount of the note in cash.⁵⁹⁰

Notes Payable in Property.

§ 1734. If a note is payable in bank stock, no action will lie for damages in money without proof of a demand and refusal to pay according to its terms.⁵⁹¹ If it is payable in cotton or other property at a certain price, it has been held that the market value of the cotton at the maturity of the note may be recovered.⁵⁹² And it is provided by statute in Georgia that, where a note for goods is not punctually paid, the holder may recover the value of the goods at the time and place fixed for payment.⁵⁹³ And in Texas the holder of a note payable in cotton may recover as damages the highest market value between the maturity of the note and the time of trial.⁵⁹⁴ But if a note is for a certain sum, payable in goods designated, the measure of damages will be the sum named, and not the value of the goods.⁵⁹⁵ A distinction has been made, that if a note is payable, at the holder's election, in certain goods or money, the debt and interest are the sum recoverable, but, if it is payable in certain goods, the value of the goods, with interest, is the measure of damages.⁵⁹⁶

Confederate "Scaling Acts."

§ 1735. After the war, many of the Southern states enacted statutes defining and reducing the amount recoverable on contracts made in contemplation of a depreciated currency.⁵⁹⁷ In some states the

⁵⁹⁰ *Mason v. Toner*, 6 Ind. 328; *Grant v. Burleson*, 38 Tex. 214.

⁵⁹¹ *Markley v. Rhodes*, 59 Iowa, 57, 12 N. W. 775.

⁵⁹² *Whitsett v. Forehand*, 79 N. C. 230; *Read v. Sturtevant*, 40 Vt. 521; *Price v. Justrube*, Harp. (S. C.) 111; *Cockrell v. Warner*, 14 Ark. 345; *Johnson v. Dooley* (Ark.) 44 S. W. 1032; *Clark v. Minor*, 73 Ga. 590.

⁵⁹³ GEORGIA (Code, § 3677).

⁵⁹⁴ *Brasher v. Davidson*, 31 Tex. 190.

⁵⁹⁵ 2 Edw. Bills & N. § 1015; *Pinney v. Gleason*, 5 Wend. (N. Y.) 393.

⁵⁹⁶ *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180.

⁵⁹⁷ In ALABAMA it was provided that parol evidence should be admissible on contracts made between September 1, 1861, and May 1, 1865, to prove the consideration and intention of the parties to receive payment in Confed-

amount recoverable under these statutes is left largely in discretion of the jury.⁵⁹⁸ These statutes, although held to be constitutional,⁵⁹⁹

erate currency, and, if so, "to show the real or true value of the consideration. * * * and what amount the plaintiff is justly and equitably entitled to recover" (Ord. p. 55, § 3, affirmed 1867, Rev. Code, § 11, and repealed 1876, Code, p. 188, § 10); in ARKANSAS, that, on "any contract for the payment of money which was intended, and understood or agreed," should be paid in Confederate currency, the plaintiff should recover in United States legal tender only the value of such Confederate money, "as estimated in the community at the time and place of making the contract," with interest, and, if such intention did not appear on the paper, it might be specially pleaded and proved by parol evidence (Laws 1867, p. 195); in GEORGIA, that on contracts made before June 1, 1865, the parties may prove the consideration, "the amount and value of the property owned by the debtor at the time the debt was contracted, * * * upon the faith of which property credit was given him, the tender made by him, if any, and the loss consequent upon its refusal, the jury having power to reduce the amount according to the equities of each case, and render such verdicts as to them shall appear just and equitable" (Laws 1868, p. 148); in NORTH CAROLINA, by ordinance of 1865, that "all executory contracts solvable in money made after the depreciation of said currency before May 1, 1865, and yet unfulfilled (except official and penal bonds), shall be deemed to have been made with the understanding that they were solvable in money of the value of said currency," subject to evidence to the contrary; and by Act 1866, c. 38, that in actions for debts contracted during the war, "in which the nature of the obligation is not set forth, nor the value of the property for which such debts were contracted is stated," either party may show what was the consideration, and the jury "shall take the same into consideration and determine the value of said contract in present currency in the particular locality in which it is to be performed." And see, for scale of depreciation, Code, § 2495. The ordinance of 1865 applies to a demand note. *Stokes v. Cowles*, 70 N. C. 124. In VIRGINIA, on contracts made between June 1, 1862, and April 10, 1865, either party might show by parol evidence "what was the true understanding and agreement * * * in respect to the kind of currency in which the same was to be fulfilled, or with reference to which, as a standard of value, it was made," without special plea, and, if Confederate currency was referred to, the nominal amount should be reduced "to its true value" at the time it was made, "or at such other time as may to the court seem right in the particular case" (Laws 1865, p. 184). So, in WEST VIRGINIA, as to contracts between May 1, 1861, and May 1, 1865 (Laws 1873, p. 307).

⁵⁹⁸ *Cherry v. Rawson*, 49 Ga. 228; *Moses v. Trice*, 21 Grat. (Va.) 536; *Cherry v. Walker*, 36 Ga. 327.

⁵⁹⁹ *Holt v. Patterson*, 74 N. C. 650; *Robeson v. Brown*, 63 N. C. 554; *Rut-*
(2459)

do not apply to contracts made before the war.⁶⁰⁰ And where a judgment was rendered in 1862, and not then enforced because it would have been paid in a worthless currency, the judgment was held not to be subject to scale in 1871.⁶⁰¹ This has been held, also, of notes made during the war in renewal of notes made before the war,⁶⁰² and of notes made after the end of the war in renewal of notes that fall within the term fixed by the statute.⁶⁰³ But a note made in 1864, payable in Confederate notes, in payment of a note given by the maker, as guardian, in 1860, has been held not to be a renewal, and is therefore held liable to scale.⁶⁰⁴ And where a note made during the war, payable in "dollars," was renewed in 1866 without scaling, such renewal was held not to be a waiver of the right to have the original note scaled.⁶⁰⁵

Confederate Currency—Expressed or Intended.

§ 1736. It has been held that a note payable expressly in Confederate currency was not therefore illegal.⁶⁰⁶ And the damages recoverable on such a note are the value of such currency at the time

land v. Copes, 15 Rich. Law (S. C.) 84. But see, contra, as to Arkansas statute, Leach v. Smith, 25 Ark. 246.

⁶⁰⁰ Love v. Johnston, 72 N. C. 415; Fluit v. Nelson, 15 Rich. Law (S. C.) 9; Bone v. Graves, 43 Ga. 312. But a note in July, 1861, comes within the Georgia ordinance. Hood v. Townsend, 40 Ga. 70. So, in October, 1861. Cherry v. Rawson, 49 Ga. 228.

⁶⁰¹ Wilson v. Isbell, 45 Ala. 142. But a judgment rendered in 1864 on a note payable in 1862, in Confederate notes, has been held subject to scale. Alexander v. Rintels, 64 N. C. 634.

⁶⁰² Jackson v. Jackson, 47 Ga. 99; Cobb v. Gray, 78 N. C. 94; or to take up such note of another person, Boykin v. Barnes, 76 N. C. 318; or with another surety, Booner v. Woodall, 51 Ga. 177.

⁶⁰³ Smith v. Belk, 40 Ga. 656. So, as to the renewal of a note made during the war payable in Confederate notes, which had been scaled before the renewal was taken. Hamilton v. Willingham, 45 Ga. 500.

⁶⁰⁴ Horne v. Young, 40 Ga. 103.

⁶⁰⁵ Jarrett's Adm'r v. Nickell, 9 W. Va. 345.

⁶⁰⁶ Jordan v. Cobb, 47 Ala. 132; or "in Confederate bonds or in Confederate currency to be issued," Haughton v. Merony, 65 N. C. 124, for such currency borrowed. But a note payable in Confederate money was held to be void in Reavis v. Blackshear, 30 Tex. 753.

the note was made.⁶⁰⁷ So, if it is payable in "currency,"⁶⁰⁸ or "in common currency," at the date of its maturity.⁶⁰⁹ And it may be shown by parol evidence that a note for "dollars" made in North Carolina in 1862 was to be paid "in good money after the war,"⁶¹⁰ or that a note payable "in current funds" was to be paid in Confederate notes.⁶¹¹ On the other hand, it has been held that the scaling act does not cover a note payable "in Confederate treasury notes,"⁶¹² or payable after peace restored, "in current money at that time."⁶¹³ Where a note is payable "in common currency of the country, which will pay taxes," it will not be presumed that Confederate currency was intended.⁶¹⁴ And parol evidence is not admissible to show an agreement to pay in Confederate currency a note maturing after the

⁶⁰⁷ *Stewart v. Salamon*, 94 U. S. 434, of a Georgia note. And scale to their value at date, *Bank of Charlotte v. Davidson*, 70 N. C. 118; *Barclay v. Russ*, 14 Fla. 372; *Bank of Mobile v. Brown*, 42 Ala. 108; *Shearon v. Henderson*, 38 Tex. 245; *Matthews v. Rucker*, 41 Tex. 636; *Short v. Abernathy*, 42 Tex. 94; or at its maturity, *Rives v. Duke*, 105 U. S. 132; *Taylor v. Bland*, 60 Tex. 29; or at time of action, *Cargyle v. Belcher*, 43 Ga. 207.

⁶⁰⁸ *Parker v. Carson*, 64 N. C. 563; or in current funds, *Davis v. Glenn*, 72 N. C. 519. So, a note in May, 1863, payable "in good bankable currency," *Green v. Brown*, 64 N. C. 553; or in October, 1862, "in good paper money," *Cutcher v. Jones*, 41 Ga. 675. But see, contra, as to a note payable "in any current bank paper or state treasury notes of state of Texas," etc., *Woods v. Parker*, 36 Tex. 131.

⁶⁰⁹ *Bell v. Joyce*, 33 Tex. 479. So, a note made for a loan of Confederate notes in June, 1862, payable in March, 1864, "in such money, currency, or funds as will be generally received in this country for debts at maturity of this note." *Darcey v. Shotwell*, 49 Miss. 631. So, a note in 1864 for property purchased at an administrator's sale, "for such currency as would be received by creditors of the estate," *Laws v. Rycroft*, 64 N. C. 100; or a note in 1864, payable "in such currency as can immediately be available in payment of the old debts of the estate of P., dollar for dollar," *Rutland v. Copes*, 15 Rich. Law (S. C.) 84. So, under the Georgia statute, a note made in March, 1864, for Confederate notes borrowed, and payable in "commonly received currency at that time," although not maturing until 1868. *Thomas v. Knowles*, 40 Ga. 263.

⁶¹⁰ *Sowers v. Earnhart*, 64 N. C. 96. Or, on the contrary, in Confederate currency. *Rives v. Duke*, 105 U. S. 132.

⁶¹¹ *Smith v. Prothro*, 2 S. C. 371; *Harmon v. Wallace*, Id. 208.

⁶¹² As not being payable in money. *Toulmin v. Sager*, 42 Ala. 127.

⁶¹³ *Chapman v. Wacaser*, 64 N. C. 532; *Williams v. Monroe*, 67 N. C. 133.

⁶¹⁴ *Johnson v. Miller*, 76 N. C. 439. So, if payable simply in "dollars,"

close of the war, and payable "in the current funds of the country when due,"⁶¹⁵ or a note payable in "good, current money," with an understanding that Confederate notes would not be taken,⁶¹⁶ or, a fortiori, a note "to be paid in gold."⁶¹⁷

§ 1737. — By some of these statutes, notes made during the war, or within dates specified in the statutes, are presumed to be payable in Confederate currency;⁶¹⁸ especially if made with that understanding at the time.⁶¹⁹ Or it may be reduced to the value of the currency at the time of making it, on parol evidence of an agreement for such currency.⁶²⁰ So, a payment made in Confederate currency is good, where the note was made payable at Richmond, and no other currency was then in use there.⁶²¹ But a note payable in cotton after the close of the war has been held not to be within the Georgia ordinance.⁶²² So, in Georgia, the fact that a note was made in October, 1861, does not subject it to scaling, without other evidence of an intention for Confederate currency.⁶²³ Where a note is payable in dollars, the burden is on the defendant to show that Confederate currency was intended.⁶²⁴ And if it was given for goods purchased at a sale, under a notice that "Confederate notes will not be taken," it will rebut the presumption created in North Carolina

although given for Confederate currency collected by the maker as agent of the payee. *Massie v. Byrd*, 87 Ala. 672, 6 South. 145.

⁶¹⁵ *McKesson v. Jones*, 66 N. C. 258.

⁶¹⁶ *Lewis v. Latham*, 74 N. C. 283.

⁶¹⁷ *Bobo v. Goss*, 1 S. C. 26. But silver is a good tender, although "Payable in United States gold coin" is written across the face of the bill by a third person. *Langenberger v. Kroeger*, 48 Cal. 147.

⁶¹⁸ *Mezeix v. McGraw*, 44 Miss. 100; *Ashby's Adm'r v. Porter*, 26 Grat. (Va.) 455; *Palmer v. Love's Ex'rs*, 75 N. C. 163; *Robeson v. Brown*, 63 N. C. 554; *Sowers v. Earnhart*, 64 N. C. 96. And the Mississippi statute has been held to be constitutional. *Cowan v. McCutchen*, 43 Miss. 207.

⁶¹⁹ *Gilkeson v. Smith*, 15 W. Va. 44; Act 1872, c. 116, p. 307.

⁶²⁰ *Fife v. Turner*, 11 Fla. 289.

⁶²¹ *Lester v. Manufacturing Co.*, 1 Hun (N. Y.) 288.

⁶²² *Phillips v. Ocmulgee Mills*, 55 Ga. 633.

⁶²³ *Rawson v. Cherry*, 54 Ga. 276.

⁶²⁴ *Neely v. McFadden*, 2 S. C. 169; *Halfacre v. Whaley*, 4 S. C. 173; *Bonner v. Nelson*, 57 Ga. 433; *Hightower v. Maull*, 50 Ala. 495; *Wilcoxon v. Reynolds*, 46 Ala. 529. So, a note made in the fall of 1865 for another note of 1863. *McNeel v. Smarr*, 3 S. C. 198. And see § 102, *supra*.

by the scaling act.⁶²⁵ And although a check is protested for want of funds, and would have been paid in Confederate currency, if good, the drawer will be liable for the full amount.⁶²⁶

Value of Consideration Recoverable.

§ 1738. In the absence of statutory provisions, it will be no defense to a note given for property that the property was valued in a depreciated currency.⁶²⁷ But, under the scaling ordinance of North Carolina, only the value of such consideration is recoverable on a note made during the war.⁶²⁸ And, if such note has been partly paid in Confederate currency, the balance will be subject to a proportionate scale.⁶²⁹ So, in Alabama, if a note payable in "dollars" was understood to be in Confederate currency, the damages recoverable on it are the value of the consideration.⁶³⁰ And in North Carolina the value of the property purchased, and not of the amount named in Confederate notes, is to be considered,⁶³¹ notwithstanding an agreement that the note might be paid in such currency.⁶³² And if an executor sells land, and afterwards pays the share of one of the heirs in his individual notes, they will not be subject to scale down to the value of the land.⁶³³ But a note for cotton purchased at an administrator's sale will be scaled to the value of the cotton at that time and place.⁶³⁴

If the consideration for a note is a loan of Confederate money, only its value at that time can be recovered.⁶³⁵ But if an indorser

⁶²⁵ *Cherry v. Savage*, 64 N. C. 103.

⁶²⁶ Although not presented by the holder for several months. *Bell v. Alexander*, 21 Grat. (Va.) 1. But see, contra, where the holder refused the money on presentment, which would have been paid in such currency. *Dearing's Adm'r v. Rucker*, 18 Grat. (Va.) 426.

⁶²⁷ *Crosby v. Tucker*, 21 La. Ann. 512.

⁶²⁸ *Dancey v. Braswell*, 64 N. C. 102.

⁶²⁹ *Brown v. Foust*, 64 N. C. 672.

⁶³⁰ *Whitfield v. Riddle*, 52 Ala. 467.

⁶³¹ *Bryan v. Harrison*, 69 N. C. 151; *Maxwell v. Hipp*, 64 N. C. 98.

⁶³² *McRae v. McNair*, 69 N. C. 12; *Dowd v. Railroad Co.*, 70 N. C. 468.

⁶³³ *Howard v. Beatty*, 64 N. C. 559. Especially where the sale took place before the war. *McCombs v. Griffith*, 67 N. C. 83.

⁶³⁴ *Moye v. Pope*, 64 N. C. 543.

⁶³⁵ *Kendrick v. Forney*, 22 Grat. (Va.) 748; *Blow v. White*, 41 Ga. 293; (2463)

transfers a note for Confederate currency, although he afterwards takes it up in the same currency, the value of such currency will not be the measure of his damages against the maker.⁶³⁶ It may be shown, however, by parol, that a note was given for a loan in such currency, although another consideration is expressed.⁶³⁷ And where a note was given for the purchase of property, and is liable to scale to the value of the consideration, the estimate of the parties at the time of sale is admissible as evidence of such value.⁶³⁸ And if a note made in 1862 for a loan of Confederate currency is transferred by the payee in 1863 for land purchased by him, the value of the currency in 1862, and not of the land in 1863, will be the measure of the damages against maker and indorser.⁶³⁹ A note may be subject, however, to scale, as against the maker, although the guarantor remains liable for its entire face.⁶⁴⁰

Terrell v. Walker, 66 N. C. 244; *Wooten v. Sherrard*, 68 N. C. 334, 71 N. C. 374; *Forcheimer v. Holly*, 14 Fla. 239.

⁶³⁶ *Barnett v. Cecil*, 21 Grat. (Va.) 93.

⁶³⁷ *Hudson v. Spence*, 49 Ga. 479; Rev. Code, § 3707.

⁶³⁸ *Ogburn v. Teague*, 67 N. C. 355. So, where the owner valued the note at \$100, and stamped it as such after the war. *Kile v. Johnson*, 48 Ga. 189. And, where the plea admitted the consideration of the note in 1864 to be worth \$100, it could not be scaled below. *Hartridge v. Fry*, 41 Ga. 104.

⁶³⁹ *Summers v. McKay*, 64 N. C. 555. But see, as to the indorser's liability, *Sanders v. Jarman*, 67 N. C. 86.

⁶⁴⁰ *James v. Long*, 68 N. C. 218.

(2464)

CHAPTER XLIV.**DEFENSE—ALTERATION AND FORGERY.**

-
- § 1739. Forgery.
1740. — Notice of Discovery.
1741. — Foreign Statutes.
1742. Alteration—Material.
1743. — Immaterial.
1744. Change of Party—Addition of Maker.
1745. — Addition of Surety.
1746. — Addition of Other Signature.
1747. — Qualification of Signature.
1748. — Erasure of Maker.
1749. — Payee's Name.
1750. — Negotiable Words.
1751. Change of Contract—Promise.
1752. — Condition—Consideration.
1753. — Indorsement.
1754. — Amount.
1755. — Medium of Payment.
1756. — Interest Clause.
1757. — Date.
1758. — Time of Payment.
1759. — Place of Payment.
1760. — Memoranda.
1761. — Seal—Attestation.
1762. — Number—Stamp.
1763. Discharge of Original Debt.
1764. Spoliation—By Stranger.
1765. Alteration by Mistake—Correction.
1766. Consent.
1767. — How Proved.
1768. — Implied from Blanks.
1770. — Implied from Blanks—Negligence.
1771. — By Other Party.
1773. Stamp Act.
1774. Ratification and Waiver.
1775. — By Acknowledgment—Promise.
1776. — What is not.
1777. Defense against Bona Fide Holder.

§ 1779. Estoppel by Indorsement.

1780. — By Acceptance.

1781. — By Conduct—Admissions.

1782. — By Laches.

1783. Alteration—How Pleaded.

1784. — Burden of Proof.

1786. — Evidence.

Forgery.

§ 1739. All defenses are on the ground (1) that the party did not execute the instrument declared on, or (2) that the instrument as executed had no binding force as alleged, or (3) that the defendant's liability has been discharged or modified. Of the first class of defenses are forgery and alteration.

Forgery is the counterfeiting or altering of any writing with intent to defraud.¹ A forged instrument is not the contract of the party named, and involves no liability on his part, unless by his conduct he estops himself from setting up the defense. Thus, if the drawee pays a forged check, he will still be liable to the drawer for the funds in hand, as though no payment had been made.² But where he is directed by the drawer to accept a bill on receiving "a clean bill of lading" for a certain cargo, his acceptance of a genuine bill on the receipt of a forged bill of lading will bind the drawer.³

¹ Byles, Bills, 331. And see Chit. Bills, 864; 2 Daniel, Neg. Inst. 356; 1 Edw. Bills & N. § 268; 2 Pars. Notes & B. 583. Although the forger personates an intended payee of the same name. *Com. v. Foster*, 114 Mass. 311. So, the signature of a note without authority of the maker may be a forgery. *Beeber v. Pabst* (Pa. Sup.) 7 Atl. 748. And the holder of a forged check cannot recover damages against the drawee for its detention, when presented for payment. *Terry v. Allis*, 16 Wis. 504. So, the writing of a fictitious name fraudulently is a forgery. *Brown v. People*, 8 Hun (N. Y.) 562; *Rex v. Whiley*, Russ. & R. 90; *Rex v. Bolland*, 1 Leach, 83; *Rex v. Dunn*, Id. 57; *Gibson v. Minet*, 1 H. Bl. 569, 583; *Schultz v. Astley*, 2 Bing. N. C. 544.

² Chit. Bills, 220; *Hall v. Fuller*, 5 Barn. & C. 750, 8 Dowl. & R. 404; *Mackintosh v. Bank*, 123 Mass. 393; *Weisser v. Denison*, 10 N. Y. 68; *Laborde v. Association*, 4 Rob. (La.) 190.

³ *Ulster Bank v. Synnott*, 5 Ir. R. Eq. 395. But payment of a bill on the strength of forged collateral cannot be recovered on the ground of mistake. *First Nat. Bank of Detroit v. Burkham*, 32 Mich. 328. And if a bank pays a forged acceptance, under a mistaken direction of the acceptor referring to another similar acceptance, it cannot hold the acceptor liable. *First Nat. Bank v. Tappan*, 6 Kan. 456.

If a bank pays a check to a holder under a forged indorsement, the payment will not be binding upon the drawer, although he fails to examine his bank book and give notice of the forgery promptly.⁴ So, if a check is stolen from the payee, and is afterwards paid by the bank on a forged indorsement to a bona fide holder (who took it notwithstanding its being crossed to another bank, and paid it over as collecting agent to his principal), the drawer, having been charged with the check, may recover the money from the party who received it.⁵ A forged indorsement or assignment gives no right, even to a bona fide purchaser, as against a party whose name is forged.⁶ And the owner may recover a stolen bond from one who purchased it in good faith under a forged indorsement in the payee's name, although the owner had himself purchased it from the payee indorsed in blank, and the thief had erased the indorsement, and afterwards indorsed it himself as payee.⁷ So, where a bank issues its certificate of deposit, which is specially indorsed by the payee, and lost in the mail in course of transmission to his indorsee, and the bank pays it on a forged indorsement, it will still be liable to the payee for the amount.⁸

It is the duty of the drawee to know the drawer's signature, and it has been held that where the drawee sends a clerk to pay a bill, and it proves to be forged, the drawee cannot afterwards recover the amount from a party receiving it in good faith.⁹

⁴ *Welsh v. Bank*, 73 N. Y. 424; *United Security Insurance & Trust Co. v. Central Nat. Bank* (Pa. Sup.) 40 Atl. 97; *Pollard v. Wellford* (Tenn. Sup.) 42 S. W. 23. And he need not compare the checks returned with the bank list. *Clark v. Bank* (App. Div.) 52 N. Y. Supp. 1064.

⁵ *Bobbett v. Pinkett*, 1 Exch. Div. 368.

⁶ *Citizens' State Bank of Newcastle v. Adams*, 91 Ind. 280. It creates no liability, and passes no title. *Thorpe v. Dickey*, 51 Iowa, 676, 2 N. W. 581; *McCarville v. Lynch*, 14 Misc. Rep. 174, 35 N. Y. Supp. 383; *Ehrler v. Braun*, 120 Ill. 503, 12 N. E. 906. And see § 1468, *supra*.

⁷ *Colson v. Arnot*, 57 N. Y. 253.

⁸ In an action of trover, or for money had and received. *Talbot v. Bank*, 1 Hill (N. Y.) 295.

⁹ *Price v. Neal*, 1 W. Bl. 390, 3 Burrows. 1354. And see §§ 1486, 1487, *supra*. On the other hand, the drawee of a check cannot require the holder to prove the genuineness of the drawer's signature. *Allen v. Kramer*, 2 Ill. App. 205. And the drawee is not entitled to require an indorsement from the holder of a bill or check, even by way of receipt, § 1414, *supra*; although he may and

Some cases, however, have held that the drawee of a check does not warrant the drawer's signature by paying it, and that he may recover the amount paid from the party receiving it.¹⁰ Cases of this sort generally turn on the relative negligence of the parties paying and receiving, and a recovery by the drawee of payment made on a forged check or bill or on a forged indorsement is generally barred, if at all, by negligence on his part amounting to matter of estoppel. But it has been held that the government, paying a check upon a forged indorsement, may recover the amount paid, in the absence of negligence, upon discovery of the forgery many years afterwards.¹¹

Where a bank pays its certificate of deposit to another bank on a forged indorsement of the payee's name, made by a mark witnessed by an employé in the bank which took and presented the certificate, it may recover the amount from such bank.¹² But if it pays on a forged indorsement of the payee to a collecting bank, and the money is paid over by it, the bank which gave the certificate cannot afterwards recover the money paid.¹³

Notice of Forgery Discovered.

§ 1740. The party making payment on a forged bill or indorsement must give prompt notice on discovery of the forgery, and even a brief delay in giving such notice has been held to cut off his right to recover the payment.¹⁴ So, where one pays out a counterfeit bill should require its surrender on payment, § 1415, *supra*. The holder who indorses places himself, therefore, needlessly in a position of liability, exonerating the drawee.

¹⁰ *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. St. 435; *Bank of Commerce v. Union Bank*, 3 N. Y. 230. So, where the holder had purchased the forged check from a stranger, and had already paid for it, *Third Nat. Bank of St. Louis v. Allen*, 59 Mo. 310.

¹¹ *U. S. v. National Park Bank*, 6 Fed. 852.

¹² *State Nat. Bank v. Freedmen's Savings & Trust Co.*, 2 Dill. 11, Fed. Cas. No. 13,324.

¹³ *Stout v. Benolst*, 39 Mo. 277.

¹⁴ Seven days, *Smith v. Mercer*, 6 Taunt. 76; or nine, *Redington v. Woods*, 45 Cal. 406; or fourteen, *Davies v. Watson*, 2 Nev. & M. 709; or a month, *Thomas v. Todd*, 6 Hill (N. Y.) 340; *United States v. Bank*, 45 Fed. 163; or until the collecting bank had paid over the amount to its customer, *Iron City Nat. Bank v. Ft. Pitt Nat. Bank*, 159 Pa. St. 46, 28 Atl. 195. And see §§ 1469, 1488, *supra*.

in good faith, he is only required to take it back if it is returned to him within a reasonable time.¹⁵ But, where a forged check is deposited in a bank for collection, the bank will not be liable as agent to its depositor for detention of the check by the drawee beyond the time allowed by the clearing-house rules.¹⁶ And such rules have been held to relate to the sufficiency of the drawer's deposit rather than the genuineness of the signature, and not to affect a drawee who discovered the forgery and returned the check two days after he had paid it.¹⁷

Foreign Statutes.

§ 1741. In some countries it is specially provided by statute that no rights can be acquired under a forged signature.¹⁸ The acceptance of a forged bill is a nullity.¹⁹ But the indorsements are declared to be valid, although the bill itself is forged.²⁰ So, a forged indorsement will transfer no title, but a genuine indorser will be liable to his indorsee.²¹ So, the acceptance of a bill may be a forgery without rendering other genuine signatures ineffectual.²² And the rights of the holder against drawer and indorsers will in such case remain intact.²³

¹⁵ *Shums v. Clark*, 11 Ill. 137.

¹⁶ *Stuyvesant Bank v. National Mechanics' Banking Ass'n*, 7 Lans. (N. Y.) 197.

¹⁷ *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. St. 435. Although returned too late to enable the bank to secure itself or pursue the forger. *Frank v. Bank*, 84 N. Y. 209.

¹⁸ GREAT BRITAIN (Bills of Exchange Act, § 24).

¹⁹ ARGENTINE REPUBLIC (Code Com. art. 824); BOLIVIA (Code Com. art. 392); CHILI (Code Com. art. 676); COLOMBIA (Code Com. art. 420); COSTA RICA (Code Com. art. 410); ECUADOR (Code Com. as in "Spain"); MEXICO (Code Com. art. 356); PERU (Code Com. art. 421); SPAIN (Code Com. art. 463); URUGUAY (Code Com. art. 842).

²⁰ HUNGARY (Exch. Law, § 39).

²¹ ARGENTINE REPUBLIC (Code Com. art. 806); BRAZIL (Code Com. art. 363); HOLLAND (Exch. Law, art. 137); PORTUGÁL (Code Com. art. 358); URUGUAY (Code Com. art. 825).

²² AUSTRIA (Exch. Law, arts. 75, 76); GERMANY (Exch. Law, arts. 75, 76).

²³ ARGENTINE REPUBLIC (Code Com. art. 816); BRAZIL (Code Com. art. 394); HOLLAND (Exch. Law, art. 145); PORTUGAL (Code Com. art. 366).

Material Alteration Discharges.

§ 1742. The material alteration of a bill by a party discharges all parties not consenting to it.²⁴ And it is sufficient to show that the bill has been materially altered without any allegation or proof of fraud.²⁵ If the alteration is material and beneficial to the holder, fraud will be presumed as against him.²⁶ And where payment is made by mistake on an altered bill, from which the party paying had been discharged by the alteration, he may recover the payment so made.²⁷ If it is altered designedly by the owner, it will be rendered void even without fraud on his part.²⁸ A material alteration makes a new contract, and discharges both maker²⁹ and surety.³⁰ So, the drawer and indorser will be discharged, if the bill is altered before acceptance, although the acceptance may be valid.³¹ So, if it is altered by the acceptor, and the payee fails to return it to the drawer.³²

Immaterial Alteration.

§ 1743. An alteration, to effect the discharge of any party, must be in a material part of the instrument. If it does not vary the meaning of the paper, it is immaterial who made it.³³ And although

²⁴ Benj. Chalm. Dig. art. 244; Chit. Bills, 208; 2 Daniel, Neg. Inst. 383; 1 Edw. Bills & N. § 244; *Master v. Miller*, 2 H. Bl. 140; *Hood's Appeal* (Pa. Sup.) 7 Atl. 137; *Presbury v. Michael*, 33 Mo. 542; *Mackay v. Dodge*, 5 Ala. 388; *Dietz v. Harder*, 72 Ind. 208; *Monroe v. Paddock*, 75 Ind. 422; *Bowman v. Mitchell*, 79 Ind. 84; *Batchelder v. White*, 80 Va. 103; *Northern Bank v. Farmers' Bank*, 18 B. Mon. (Ky.) 506.

²⁵ *Eckert v. Pickel*, 59 Iowa, 545.

²⁶ *Huntington v. Finch*, 3 Ohio St. 445.

²⁷ *Fraker v. Little*, 24 Kan. 598.

²⁸ *Vanauken v. Hornbeck*, 14 N. J. Law, 178; *First Nat. Bank of Springfield v. Fricke*, 75 Mo. 178.

²⁹ *Chism v. Toomer*, 27 Ark. 108; *Lee v. Starbird*, 55 Me. 491; *Pankey v. Mitchell*, 1 Ill. 383.

³⁰ *Bethune v. Dozier*, 10 Ga. 235; *Mackay v. Dodge*, 5 Ala. 388; *Ide v. Churchill*, 14 Ohio St. 372; *Johnston v. May*, 76 Ind. 293.

³¹ *Bathe v. Taylor*, 15 East, 412.

³² *Paton v. Winter*, 1 Taunt. 420.

³³ Chit. Bills, 211; *Earl of Falmouth v. Roberts*, 9 Mees. & W. 469.

made without consent, and after the bill is complete and delivered, it will not invalidate it.³⁴ So, if words are inserted which the law necessarily implies, it will not affect the validity of the bill;³⁵ or, if a writing in pencil is retraced in ink, it will not be material.³⁶ But any alteration which changes the operation of the bill and the liability of the parties will be material, whether the change is prejudicial or not.³⁷ The materiality of an alteration is a question of law for the court to determine.³⁸

Addition of Maker.

§ 1744. The addition of another maker after the execution of the note is a material alteration, and discharges those who have already signed it,³⁹ whether the note is a joint note,⁴⁰ or joint and several.⁴¹

³⁴ *Humphreys v. Crane*, 5 Cal. 173. Either at common law or under the English Stamp Acts. *Chit. Bills*, 211; 1 *Edw. Bills & N.* § 259; *Sanderson v. Symonds*, 1 *Brod. & B.* 426; *Walter v. Cubley*, 2 *Crompt. & M.* 151.

³⁵ *Chit. Bills*, 212; *Doe v. Houghton*, 1 *Man. & R.* 208.

³⁶ *Reed v. Roark*, 14 *Tex.* 329. Although in so doing the payee inadvertently changed the spelling of the maker's name. *Dunn v. Clements*, 52 *N. C.* 58.

³⁷ *Benj. Chalm. Dig. art.* 247; 1 *Edw. Bills & N.* § 247; 2 *Pars. Notes & B.* 551, 564; *Gardner v. Walsh*, 5 *El. & Bl.* 83; *Craighead v. McLoney*, 99 *Pa. St.* 211; *Herrick v. Baldwin*, 17 *Minn.* 209 (*Gill*, 183). The test is not whether it reduces a party's liability, but whether it is the same note. *Johnston v. May*, 76 *Ind.* 293.

³⁸ *Benj. Chalm. Dig. art.* 247; *Chit. Bills*, 208; *Vance v. Lowther*, 1 *Exch. Div.* 176; *Bowers v. Jewell*, 2 *N. H.* 543; *Hill v. Calvin*, 4 *How. (Miss.)* 231; *Overton v. Matthews*, 35 *Ark.* 146; *Fisherdlck v. Hutton*, 44 *Neb.* 122, 62 *N. W.* 488; *Winkles v. Guenther*, 98 *Ga.* 472, 25 *S. E.* 527. But in *Moye v. Herndon*, 30 *Miss.* 110, both the fact of the alteration and its materiality were left to the jury.

³⁹ *Nicholson v. Combs*, 90 *Ind.* 515; *Singleton v. McQuerry*, 85 *Ky.* 41, 2 *S. W.* 652; *Hamilton v. Hooper*, 46 *Iowa*, 515; *Dickerman v. Miner*, 43 *Iowa*, 508; *Sullivan v. Rudisill*, 63 *Iowa*, 158, 18 *N. W.* 856; *Browning v. Gosnell*, 91 *Iowa*, 448, 59 *N. W.* 340; *First Nat. Bank of Butte v. Weidenbeck*, 87 *Fed.* 271; *Heath v. Blake*, 28 *S. C.* 406, 5 *S. E.* 842; *Ford v. Bank* (*Tex. Civ. App.*) 84 *S. W.* 684; *Bank of Limestone v. Penick*, 5 *T. B. Mon. (Ky.)* 31; *Harper v. Stroud*, 41 *Tex.* 636; *Lunt v. Silver*, 5 *Mo. App.* 186; including sureties,

⁴⁰ *Wallace v. Jewell*, 21 *Ohio St.* 163.

⁴¹ *Benj. Chalm. Dig. art.* 247; *Gardner v. Walsh*, 5 *El. & Bl.* 83; *Shipp's Adm'r v. Suggett's Adm'r*, 9 *B. Mon. (Ky.)* 5. But see, contra, *Miller v. Finley*, 26 *Mich.* 249.

And, although a note signed by A. is joint and several in its terms, the maker will be discharged by the subsequent insertion over his signature of the words, "for A. & B." ⁴² So, the original maker will be discharged, where an additional maker is afterwards procured from another county for the purpose of bringing the note within the jurisdiction of the courts of that county. ⁴³ But the new maker will be liable, although the others are discharged. ⁴⁴ And where the addition completes the original contract, and does not vary the contract of the original maker, the latter remains liable. ⁴⁵ So, where the signature is that of a married woman, and it is not binding on her without a separate estate, it will be immaterial, in the absence of proof on the defendant's part that she has such estate. ⁴⁶

And where one maker signs a printed blank, and delivers it to his co-maker, to be negotiated for the accommodation of the latter, the addition of another maker by such co-maker will not discharge the accommodation maker. ⁴⁷ So, an accommodation indorser will not be discharged, where the maker procures the signature of an additional maker, and erases it again before issuing the note. ⁴⁸ So, an accommodation maker, by the addition of the signature of the accommodated payee below his own. ⁴⁹

McVean v. Scott, 46 Barb. (N. Y.) 379; and indorsers, *Henry v. Coats*, 17 Ind. 161. But see, contra, in the absence of fraud, *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Rudolph v. Brewer*, 96 Ala. 189, 11 South. 314; *Union Banking Co. v. Martin's Estate* (Mich.) 71 N. W. 867; *Crandall v. Bank*, 61 Ind. 349.

⁴² *Chadwick v. Eastman*, 53 Me. 12.

⁴³ *Bowers' Adm'r v. Briggs*, 20 Ind. 139.

⁴⁴ *Dickerman v. Miner*, 43 Iowa, 508; *Hamilton v. Hooper*, 46 Iowa, 515; *Hochmark v. Richler*, 16 Colo. 263, 26 Pac. 818. But not as joint maker. *Howe v. Taggart*, 133 Mass. 284.

⁴⁵ Where a new signature is added before the note is negotiated, *Brownell v. Winnie*, 29 N. Y. 400; *Card v. Miller*, 1 Hun (N. Y.) 504; *Favorite v. Stillham*, 84 Ind. 423; *Snyder v. Van Doren*, 46 Wis. 602, 1 N. W. 285. So, where the new party becomes a surety or guarantor, and his signature makes a new and independent contract as to him. *Stone v. White*, 8 Gray (Mass.) 589; *McCaughey v. Smith*, 27 N. Y. 39.

⁴⁶ *Williams v. Jensen*, 75 Mo. 681.

⁴⁷ *Snyder v. Van Doren*, 46 Wis. 602, 1 N. W. 285.

⁴⁸ *Whitmore v. Nickerson*, 125 Mass. 496.

⁴⁹ *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567; *Babcock v. Murray*, 58 Minn. 385, 59 N. W. 1038; *Denick v. Hubbard*, 27 Hun (N. Y.) 347.

Addition of Surety.

§ 1745. Where the signature of another is added as surety for the maker without his consent, it will discharge his liability, unless it was done in pursuance of the original agreement.⁵⁰ And such addition has been held to discharge the original surety,⁵¹ although the new surety may not be liable (on account of fraud upon him),⁵² and although his name may afterwards be cut off before suit is brought.⁵³ So, where two sureties named in a bond do not sign it, and two others sign who are not named, it will discharge an original surety, who delivered the bond to his principal to be executed by the sureties named in it.⁵⁴ But the addition of another surety to a joint and several note after its execution, by consent of all parties, will not preclude an original surety who has paid the bill from recovering against its principal.⁵⁵

Where a surety is added without the consent of the other party, he will still be liable.⁵⁶ And, where the signature of a new surety is added to a demand note some months after its execution, it has been held to constitute a new contract as to him, and not an alteration of the original note.⁵⁷ And such signature has been held not to be a material alteration,⁵⁸ and not to discharge the principal debtor, who could not be prejudiced by it.⁵⁹ And the alteration of a note by the addition of a surety's name is, in like manner, no discharge of a collateral mortgage given by such surety.⁶⁰

⁵⁰ Byles, Bills, 326; Chit. Bills, 215; Clark v. Blackstock, Holt, 474; Ex parte White, 2 Denc. & C. 334. But see, contra, Barnes v. Van Keuren, 31 Neb. 165, 47 N. W. 848; Royse v. Bank, 50 Neb. 16, 60 N. W. 301.

⁵¹ Berryman v. Manker, 56 Iowa, 150, 9 N. W. 103. But see, contra, Graham v. Rush, 73 Iowa, 451, 35 N. W. 518; Anderson v. Bellenger, 87 Ala. 334, 6 South. 82; Ward v. Hackett, 30 Minn. 150, 14 N. W. 578.

⁵² Conger v. Bean, 58 Iowa, 321, 12 N. W. 284.

⁵³ Hall's Adm'r v. McHenry, 19 Iowa, 521.

⁵⁴ Hall v. Smith, 14 Bush (Ky.) 604.

⁵⁵ Chit. Bills, 216; Catton v. Simpson, 8 Adol. & E. 136.

⁵⁶ Dodge v. Pringle, 29 Law J. Exch. 115.

⁵⁷ Stone v. White, 8 Gray (Mass.) 589.

⁵⁸ Robbins v. Brooks, 42 Mich. 62, 3 N. W. 256; Ward v. Hackett, 30 Minn. 150, 14 N. W. 578.

⁵⁹ Miller v. Finley, 26 Mich. 249; Nelson v. White, 61 Ind. 139.

⁶⁰ Mersman v. Werges, 112 U. S. 139, 5 Sup. Ct. 65, reversing 3 Fed. 378.

Other Signatures Added.

§ 1746. An indorser will not be discharged by the addition of a third party as acceptor;⁶¹ or, in pursuance of the original intention, by the addition of another and prior indorser.⁶² So, if the payee of a note, intending to negotiate it, signs his name under that of the maker, it will not be a material alteration or discharge the surety.⁶³ But where he wrote his name under that of the maker, with the word "Surety," it was held to be a material alteration.⁶⁴ If, however, he signs it in that place by inadvertence, intending to be a guarantor, it will not render the note void.⁶⁵ The payee's signature placed under that of the maker will be held to be a mere indorsement, if it is so intended.⁶⁶ And the maker will not be discharged, although the note is payable to bearer, and the signature so placed was erased by the payee on taking up the note.⁶⁷

Qualification of Signature.

§ 1747. Where A. and B. sign a bill in their joint name (although they are not partners), the subsequent addition of their individual signatures under their joint signature, after acceptance, will not be a material alteration to discharge the acceptor.⁶⁸ So, it is not a material alteration to add the word "Agent" to a maker's signature, since his liability is not thereby altered.⁶⁹ Still less to retouch the signature⁷⁰ or to make a cross after the signature.⁷¹ But it is ma-

⁶¹ *Smith v. Lockridge*, 8 Bush (Ky.) 423.

⁶² *London & P. Bank v. Roberts*, 22 Wkly. Rep. 402.

⁶³ *Bowser v. Rendell*, 31 Ind. 128; *Denick v. Hubbard*, 27 Hun (N. Y.) 347.

⁶⁴ *Chappell v. Spencer*, 23 Barb. (N. Y.) 584.

⁶⁵ Although it might do so, if the note were payable to the maker's order. *Cason v. Wallace*, 4 Bush (Ky.) 388.

⁶⁶ *Ex parte Yates*, 2 De Gex & J. 191.

⁶⁷ *Muir v. Demaree*, 12 Wend. (N. Y.) 468.

⁶⁸ *Blair v. Bank*, 11 Humph. (Tenn.) 84.

⁶⁹ *Manufacturers' & Merchants' Bank v. Follett*, 11 R. I. 92.

⁷⁰ *United States Nat. Bank v. National Park Bank*, 59 Hun, 495, 13 N. Y. Supp. 411.

⁷¹ *King v. Rea*, 13 Colo. 69; 21 Pac. 1084.

terial to add the word "Surety" to a maker's signature.⁷² Where, however, a note is indorsed, "A. B., Cashier," the holder may write the name of the bank "for the ——— Bank," above the indorsement.⁷³ And it has been held that an acceptor will not be discharged by writing his address below the signature.⁷⁴ But where he adds the address to the maker's signature, and such address is necessary to render the note negotiable, it will be a material alteration, and discharge the maker.⁷⁵

So, if a note signed, "A. B., Treasurer of St. Paul's Parish," is changed to "Treasurer for," etc., with the addition of the words "duly authorized," it will be a material alteration, and discharge the indorser.⁷⁶ So, it has been held to be material to add to the maker's name as payee and signature as indorser the words, "President A. B. Association," and to discharge a co-maker.⁷⁷ So, it is material to add to the maker's signature the words "and Co."⁷⁸ On the other hand, it has been held to be immaterial to cut off from a signature the word "President" or "Secretary,"⁷⁹ or the words "as Trustees of the First Univ. Soc."⁸⁰

Erasure of Maker.

§ 1748. In like manner, the consent of all is necessary to the erasure of any one maker.⁸¹ And it is a material alteration, if an instrument of guaranty is executed by several parties, and the party

⁷² *Laub v. Paine*, 46 Iowa, 550. So, the erasure of such word. *Rogers v. Tapp*, 14 Cent. Law J. 38.

⁷³ *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Folger v. Chase*, 18 Pick. (Mass.) 63.

⁷⁴ *Marston v. Petit*, 1 Camp. 82, note; or the indorser's address, *Struthers v. Kendall*, 41 Pa. St. 214.

⁷⁵ *Commercial & Farmers' Bank v. Patterson*, 2 Cranch, C. C. 346, Fed. Cas. No. 3,056.

⁷⁶ *Sheridan v. Carpenter*, 61 Me. 83.

⁷⁷ *First Nat. Bank of Springfield v. Fricke*, 75 Mo. 178.

⁷⁸ And such addition will discharge an indorser, although there was no such firm, but the maker was a member of another firm. *Haskell v. Champion*, 30 Mo. 136.

⁷⁹ *Thackaray v. Hanson*, 1 Colo. 365.

⁸⁰ *Burlingame v. Brewster*, 79 Ill. 515; *Hayes v. Matthews*, 63 Ind. 412.

⁸¹ *Barrington v. Bank*, 14 Serg. & R. (Pa.) 405. And the payee's consent will not bind other makers. *Morrison v. Garth*, 78 Mo. 434.

guarantied strikes out the names of each on payment by him of his proportion.⁸² The cutting off of the name of a joint maker renders the note void,⁸³ although the note is joint and several in its terms.⁸⁴ This has been questioned, however, in the latter case, unless the erasure is shown to be with the intention of discharging the other maker.⁸⁵ And the maker of a joint note will not be discharged by the erasure of the name of an infant joint maker, after the contract had been repudiated and rescinded by him.⁸⁶

The erasure of a surety's name in the body of a note, and the substitution of another surety, has been held not to be a material alteration.⁸⁷ But, in general, the cutting off of the name of a surety is a material alteration,⁸⁸ or the cutting off of one and adding of another co-maker.⁸⁹ And one surety will be discharged by the cutting off of a co-surety or co-maker and substitution of another without his consent.⁹⁰ But the erasure of a surety has been held not to discharge the principal debtor.⁹¹

Alteration of Payee's Name.

§ 1749. It is a material alteration to change the name of the payee⁹² or of a special indorsee.⁹³ And such alteration, fraudulently

⁸² *Bank of Hindostan v. Smith*, 36 Law, J. C. P. 241.

⁸³ *Piercy's Heirs v. Piercy*, 5 W. Va. 199; *Gillett v. Sweat*, 6 Ill. 475. Although it would still be the subject of larceny. *People v. Call*, 1 Denio (N. Y.) 120.

⁸⁴ *Mason v. Bradley*, 11 Mees. & W. 590.

⁸⁵ *Chit. Bills*, 210; *Nicholson v. Revill*, 4 Adol. & E. 675. And even with such intention, after part payment. *Eldred v. Peterson*, 80 Iowa, 264, 45 N. W. 755.

⁸⁶ *Young v. Currier*, 63 N. H. 419.

⁸⁷ *Jones v. Insurance Co.*, 1 Metc. (Ky.) 58.

⁸⁸ *Mason v. Bradley*, 11 Mees. & W. 590; *McCramer v. Thompson*, 21 Iowa, 244; *Broughton v. West*, 8 Ga. 248.

⁸⁹ *Davis v. Coleman*, 29 N. C. 424; *Smith v. Weld*, 2 Pa. St. 54.

⁹⁰ *Hall's Adm'x v. McHenry*, 19 Iowa, 521.

⁹¹ *Huntington v. Finch*, 3 Ohio St. 445.

⁹² *Stoddard v. Penniman*, 108 Mass. 366; *Davis v. Bauer*, 41 Ohio St. 257; *Erickson v. Bank*, 44 Neb. 622, 62 N. W. 1078; *Horn v. Bank*, 32 Kan. 518, 4 Pac. 1022; *Robinson v. Berryman*, 22 Mo. App. 509; *Bell v. Mahin*, 69 Iowa,

⁹³ *Grimes v. Piersol*, 25 Ind. 246, 30 Ind. 129. And see § 718, *supra*.

made, is a forgery.⁹⁴ And it is a material alteration, although made without fraud and in a noticeable manner.⁹⁵ So, if a note is payable to A., and indorsed by A. and B., the addition of B.'s name as payee will discharge both indorsers.⁹⁶ And it is a material alteration to add to the payee's name in the body of a note the word "Collector,"⁹⁷ or "Junior."⁹⁸

But if the payee's name is misspelled by accident, an alteration correcting the mistake, and making the name what it was intended, will not be material.⁹⁹ So, the addition of the words "and Co." to the payee's name has been held not to be material, if done in good faith;¹⁰⁰ or a change in the drawee's name from "A., B. & Co." to "A. and B.," after an acceptance by them as "A and B.";¹⁰¹ or a change in the payee's name to that of another firm, representing the same payees, by consent of the maker and payee, but after execution by the surety.¹⁰²

Negotiable Words Added.

§ 1750. Where the words "or order" have been omitted by mistake, and the bill was intended to be negotiable, it has been held not to be a material alteration to insert them afterwards;¹⁰³ or to

408, 29 N. W. 331. So, by substituting husband's name for wife's. *Sneed v. Milling Co.*, 18 C. C. A. 213, 71 Fed. 493; *Id.*, 20 C. C. A. 230, 73 Fed. 925.

⁹⁴ *Bank of Commerce v. Union Bank*, 3 N. Y. 230.

⁹⁵ *German Bank v. Dunn*, 62 Mo. 79.

⁹⁶ *Aldrich v. Smith*, 37 Mich. 468.

⁹⁷ *York v. Janes*, 43 N. J. Law, 332; or "guardian," *Jackson v. Cooper* (Ky.) 39 S. W. 39.

⁹⁸ *Broughton v. Fuller*, 9 Vt. 373.

⁹⁹ E. g. "Franklin Derby" changed to "Francis E. Derby," *Derby v. Thrall*, 44 Vt. 413; or "Benj. R. Cole" to "Benj. Cole," *Cole v. Hills*, 44 N. H. 227; or by adding his full surname, *Mouchet v. Cason*, 1 Brev. (S. C.) 307.

¹⁰⁰ *Elliott v. Blair*, 47 Ill. 342.

¹⁰¹ *Byles, Bills*, 325; *Benj. Chalm. Dig. art. 247*; *Chit. Bills*, 211; *Farquhar v. Southey*, *Moody & M.* 14, 2 Car. & P. 497; *Hamelin v. Bruck*, 9 Q. B. 306.

¹⁰² *Arnold v. Jones*, 2 R. I. 345.

¹⁰³ *Benj. Chalm. Dig. art. 248*; *Chit. Bills*, 212; 2 *Daniel, Neg. Inst.* 407; *Kershaw v. Cox*, 3 Esp. 246; *Knill v. Williams*, 10 East, 435, 12 East, 475; *Bathe v. Taylor*, 15 East, 512; *Robinson v. Touray*, 1 Maule & S. 217; *Byron v. Thompson*, 11 Adol. & E. 31; *Cariss v. Tattersall*, 2 Man. & G. 890; *Granite Ry. Co. v. Bacon*, 15 Pick. (Mass.) 230.

change a bill made payable to "A. or bearer" to "A. or order";¹⁰⁴ or to add the words "or bearer" to a note, which is not negotiable, and is not made so by such addition.¹⁰⁵ But, in general, the addition of the words "or order" has been held to be material,¹⁰⁶ even though a space was left, which was not intended as a blank to be so used.¹⁰⁷ So, the addition of the words "or bearer" is material,¹⁰⁸ or the change of "order" to "bearer."¹⁰⁹ And if a clerk opens a sealed letter, and alters a check contained in it by erasing the word "order" and substituting "bearer," it will be a forgery.¹¹⁰ But it is not a forgery to cancel the crossing of a check, under the provisions of the English statute.¹¹¹ And it does not, under the bills of exchange act, affect the indorsee's right to recovery, although "order" is stricken out by the acceptor, and "in favor of the payee only" substituted.¹¹²

Alteration of Promise.

§ 1751. It is a material alteration to convert a joint note into a joint and several note;¹¹³ or to change "I" to "we";¹¹⁴ or to add

¹⁰⁴ *Benj. Chalm. Dig. art. 247; Atwood v. Griffin*, 2 Car. & P. 368; or to change "order" to "bearer," *Croswell v. Lebreer*, 81 Me. 44, 16 Atl. 331.

¹⁰⁵ *Goodenow v. Curtis*, 33 Mich. 505. And see *Weaver v. Bromley*, 65 Mich. 212, 31 N. W. 839. But see, contra, *Walton Plow Co. v. Campbell*, 35 Neb. 174, 52 N. W. 883.

¹⁰⁶ *Johnson v. Bank*, 2 B. Mon. (Ky.) 310; *Pepoon v. Stagg*, 1 Nott & McC. (S. C.) 102. And a surety will be discharged by the insertion of "or order" by the maker after delivery to the payee at the payee's request. *Haines v. Dennett*, 11 N. H. 180.

¹⁰⁷ *Bruce v. Westcott*, 3 Barb. (N. Y.) 374.

¹⁰⁸ *McCauley v. Gordon*, 64 Ga. 221; *Simmons v. Atkinson*, 60 Miss. 962, 12 South. 263.

¹⁰⁹ *Benj. Chalm. Dig. art. 247; Needles v. Shaffer*, 60 Iowa, 65, 14 N. W. 129. *Schroeder v. Webster*, 88 Iowa, 627, 55 N. W. 569; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567; *Booth v. Powers*, 56 N. Y. 22, reversing *Flint v. Craig*, 59 Barb. (N. Y.) 319.

¹¹⁰ *Belknap v. Bank*, 100 Mass. 376.

¹¹¹ *Simmons v. Taylor*, 4 C. B. (N. S.) 463. And the words "not negotiable" may be added at any time to a crossed check. *Byles, Bills*, 325.

¹¹² *De Croix v. Meyer*, 25 Q. B. Div. 343.

¹¹³ *Benj. Chalm. Dig. art. 247; Chit. Bills*, 210; 2 *Pars. Notes & B.* 561; *Perring v. Hone*, 4 Bing. 28, 2 Car. & P. 401; *Samson v. Yager*, 4 U. C. Q. B. (O. S.) 3. But see, contra, *Miller v. Reed*, 27 Pa. St. 244.

¹¹⁴ *Draper v. Wood*, 112 Mass. 315; *Eckert v. Louis*, 84 Ind. 99; *Heath v.*

words for the purpose of binding the separate property of a married woman;¹¹⁵ or to cut off part of a paper in such manner as to leave an entirely different contract;¹¹⁶ or to add such words as "without defalcation or set-off";¹¹⁷ or "without any relief from valuation or appraisement law."¹¹⁸ So, where one guaranties "the collection" of a bill, it is a material alteration to strike out those words;¹¹⁹ or to add a guaranty of payment,¹²⁰ or a waiver of demand and notice,¹²¹ to a blank indorsement.

Condition—Consideration.

§ 1752. It is also a material alteration to add a condition, e. g. that a guaranty shall only attach when a certain contract is performed,¹²² or "if suit be instituted";¹²³ or to change the condition of a collector's bond so as to include an additional township.¹²⁴ So, it is material if a condition attached to a note is separated from it,¹²⁵ especially if this is done fraudulently.¹²⁶ And such alteration amounts to a forgery.¹²⁷ But it is not material to cut off the words "upon condition," where no condition is specified,¹²⁸ or to indorse

Blake, 28 S. C. 406, 5 S. E. 842; *Humphreys v. Gullow*, 13 N. H. 385. But see, contra, *Eddy v. Bond*, 19 Me. 461.

¹¹⁵ *Taddiken v. Cantrell*, 69 N. Y. 597; *Reeves v. Pierson*, 23 Hun (N. Y.) 185; *Clapp v. Collins* (City Ct. N. Y.) 7 N. Y. Supp. 98.

¹¹⁶ *Scofield v. Ford*, 56 Iowa, 370, 9 N. W. 309.

¹¹⁷ *Davis v. Carlisle*, 6 Ala. 707. So, the words "or discount" added after the words "without defalcation." *Hunt v. Gray*, 35 N. J. Law, 227.

¹¹⁸ *Holland v. Hatch*, 11 Ind. 497. Although the contrary was held in *Holland v. Hatch*, 15 Ohio St. 464.

¹¹⁹ *Newlan v. Harrington*, 24 Ill. 206.

¹²⁰ *Iowa Val. State Bank v. Sigstad*, 96 Iowa, 491, 65 N. W. 407.

¹²¹ *Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793. And see § 708, *supra*, as to filling blank indorsements.

¹²² *Hemming v. Trenery*, 9 Adol. & El. 926.

¹²³ *Tate v. Fletcher*, 77 Ind. 102.

¹²⁴ *Miller v. Stewart*, 9 Wheat. 680.

¹²⁵ *Cochran v. Nebeker*, 48 Ind. 400; *Wait v. Pomeroy*, 20 Mich. 425; *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382.

¹²⁶ *Gerrish v. Glines*, 56 N. H. 9.

¹²⁷ *State v. Stratton*, 27 Iowa, 420.

¹²⁸ *Palmer v. Largent*, 5 Neb. 223.

a memorandum that the condition of the note has been performed.¹²⁹ It is material, however, to change the statement of the consideration.¹³⁰

Alteration of Indorsement.

§ 1753. It is not material, as we have seen, to strike out an indorsement for collection.¹³¹ But an indorser is discharged by the striking out of any indorsement prior to his own.¹³² The holder may, however, convert a blank indorsement into a special one.¹³³ But he cannot write over a blank indorsement a waiver of demand or notice,¹³⁴ or a guaranty,¹³⁵ or an agreement to "stand security till paid."¹³⁶ Nor can he add the words "without recourse,"¹³⁷ or strike such words out,¹³⁸ or change a several indorsement to a joint one.¹³⁹

An altered or forged indorsement will not effect a transfer of the paper.¹⁴⁰ But it is not a forgery to write the name of a fictitious payee as indorser, where a blank is left for the payee's name.¹⁴¹ If, however, the drawer of a bill forges the payee's indorsement, and it is afterwards accepted by the drawee and paid to the indorsee,

¹²⁹ Jackson v. Boyles, 64 Iowa, 428, 20 N. W. 746.

¹³⁰ Benj. Chalm. Dig. art. 247; Chit. Bills, 209; 2 Daniel, Neg. Inst. 407; 2 Pars. Notes & B. 562; Knill v. Williams, 10 East, 431; Low v. Argrove, 30 Ga. 129. Or to indorse as a partial payment certain liabilities which the note was made to extinguish in full. Johnston v. May, 76 Ind. 293.

¹³¹ Cassel v. Dows, 1 Blatchf. 335, Fed. Cas. No. 2,502.

¹³² Curry v. Bank, 8 Port. (Ala.) 360. As to the power to strike out indorsement, and the effect of so doing, see §§ 715, 716, 726, note, supra.

¹³³ Benj. Chalm. Dig. art. 247; Foote v. Bragg, 5 Blackf. (Ind.) 363. And as to the filling of blank indorsements, see § 710, supra.

¹³⁴ Farmer v. Rand, 14 Me. 225; Buck v. Appleton, Id. 284; Andrews v. Simms, 33 Ark. 771.

¹³⁵ Belden v. Hann, 61 Iowa, 42, 15 N. W. 591; Croskey v. Skinner, 44 Ill. 321.

¹³⁶ Clawson v. Gustin, 5 N. J. Law, 821. So, the addition of the word "surety" to a blank indorsement at the making of a note by one who was not the payee. Robinson v. Reed, 46 Iowa, 219.

¹³⁷ Luth v. Stewart, 6 Vict. Law, R. 383.

¹³⁸ Kennon v. McRea, 7 Port. (Ala.) 175.

¹³⁹ Morrison v. Smith, 13 Mo. 234.

¹⁴⁰ See §§ 662, 1739, supra.

¹⁴¹ Collis v. Emett, 1 H. Bl. 313.

the acceptor cannot recover the payment made, as on a forged indorsement, since the indorsement is immaterial, if the bill was never delivered by the drawer to the payee named.¹⁴²

Alteration in Amount.

§ 1754. It is a material alteration to raise the amount named in a bill or note.¹⁴³ And such alteration will render the instrument void in the hands of a bona fide holder, even though it cannot be detected by the closest scrutiny,¹⁴⁴ and although the holder offers to take the original amount of the note.¹⁴⁵ So, it is a material alteration to raise the marginal figures designating the amount,¹⁴⁶ or to cut them off;¹⁴⁷ although it has been held that such figures form no part of the note, and that it is not material to change them to conform to the body of the note.¹⁴⁸ If a bill is altered by raising the amount, and is afterwards accepted and paid by the acceptor in ignorance of such alteration, he may recover the payment made.¹⁴⁹ And, even if the amount is altered to a smaller sum, it will be a material alteration.¹⁵⁰ But a memorandum on the back of a note reducing the amount will not discharge a surety who did not con-

¹⁴² *Coggill v. Bank*, 1 N. Y. 113.

¹⁴³ *Batchelder v. White*, 80 Va. 103; *Hall v. Fuller*, 5 Barn. & C. 750; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Goodman v. Eastman*, 4 N. H. 455; *Leas v. Walls*, 101 Pa. St. 57; *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378; *Mills v. Starr*, 2 Bailey (S. C.) 359. And such alteration is a forgery. *Rex v. Post*, Russ. & R. 101.

¹⁴⁴ *Wade v. Withington*, 1 Allen (Mass.) 561; *Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. 802.

¹⁴⁵ *Evans v. Deming*, 20 N. Y. Wkly. Dig. 71

¹⁴⁶ *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, where amount was written in words and figures, but raised by fraudulent use of spaces left by the maker. But see, contra, where only the figures had been written as a memorandum and the amount left designedly blank, *Garrard v. Lewis*, 10 Q. B. Div. 30; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177.

¹⁴⁷ *Hall v. Bank*, 5 Dana (Ky.) 258.

¹⁴⁸ *Smith v. Smith*, 1 R. I. 398; *Houghton v. Francis*, 29 Ill. 244; *Horton v. Horton's Estate*, 71 Iowa, 448, 32 N. W. 452; *Fisk v. McNeal*, 23 Neb. 726, 37 N. W. 616.

¹⁴⁹ *White v. Bank*, 64 N. Y. 316.

¹⁵⁰ *Hewins v. Cargill*, 67 Me. 554.

sent.¹⁵¹ So, an acceptor will be liable for the amount of a bill as accepted, if accepted after being altered from a larger sum.¹⁵²

It is also a material alteration to add the rate of exchange on a foreign bill,¹⁵³ or to add attorney's fees to a note.¹⁵⁴

Alteration in Medium of Payment.

§ 1755. It is a material alteration of a note to add words making it payable in gold;¹⁵⁵ or to erase such words, even after the maturity of the note;¹⁵⁶ or to change a note payable "in drafts" to payment in "current funds";¹⁵⁷ or to add any word qualifying the goods or property in which a note is made payable;¹⁵⁸ or to change the fund mentioned and referred to for payment.¹⁵⁹

Alteration of Interest Clause.

§ 1756. It is a material alteration to add an interest clause,¹⁶⁰ even without any fraud on the holder's part,¹⁶¹ although the altera-

¹⁵¹ *Merchants' Bank v. Evans*, 9 W. Va. 373.

¹⁵² *Hamellin v. Bruck*, 9 Q. B. 306.

¹⁵³ *Bytes, Bills*, 324; *Benj. Chalm. Dig. art. 247*. Although the addition is made in red ink. *Hirschfield v. Smith*, L. R. 1 C. P. 340; *Merrick v. Boury*, 4 Ohio St. 60.

¹⁵⁴ *Burwell v. Orr*, 84 Ill. 465; or to erase such word, *First Nat. Bank of Decorah v. Laughlin*, 4 N. D. 391, 61 N. W. 473. But see *Bullock v. Taylor*, 39 Mich. 137.

¹⁵⁵ *Bogarth v. Breedlove*, 39 Tex. 561; *Wills v. Willson*, 3 Or. 308; or "in specie," *Darwin v. Rippey*, 63 N. C. 318. But see, contra, where the note was made in 1860, and there was then no other legal currency, *Bridges v. Winters*, 42 Miss. 135.

¹⁵⁶ *Church v. Howard*, 17 Hun (N. Y.) 5.

¹⁵⁷ *Angle v. Insurance Co.*, 92 U. S. 330.

¹⁵⁸ *Martendale v. Follet*, 1 N. H. 95.

¹⁵⁹ *Long v. Miller*, 93 N. C. 233.

¹⁶⁰ *Benj. Chalm. Dig. art. 247*; 2 *Daniel, Neg. Inst.* 396; *Blakey v. Johnson*, 13 Bush (Ky.) 197; *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1; *Lewis v. Shepherd*, 1 Mackey (D. C.) 46; *Meyer v. Huneke*, 55 N. Y. 412; *Schwarz v. Oppold*, 74 N. Y. 307; *McGrath v. Clark*, 56 N. Y. 34; *Long v. Mason*, 84 N. C. 15; *Bradley v. Mann*, 37 Mich. 1; *Craighead v. McLoney*, 99 Pa. St. 211; *Waterman v. Vose*, 43 Me. 504; *Boalt v. Brown*, 13 Ohio St. 364; *Jones v. Bangs*, 40 Ohio St. 139; *Bowman v. Mitchell*, 79 Ind. 84; *Hart v. Clouser*, 30

¹⁶¹ *Fay v. Smith*, 1 Allen (Mass.) 477; *Warpole v. Ellison*, 4 Houst. (Del.) 322.

tion is afterwards erased before trial.¹⁶² So, it is a material alteration to insert a figure indicating the interest to be paid;¹⁶³ or, where the rate of interest has been left blank, to fill up such blank with a rate not agreed on.¹⁶⁴ So, it is material to strike out the interest clause;¹⁶⁵ or to alter it,¹⁶⁶ e. g. by raising the rate to be paid;¹⁶⁷ or even, it has been held, by interlining the word "paid" in

Ind. 210; *Kountz v. Hart*, 17 Ind. 329; *Franklin Life Ins. Co. v. Courtney*, 60 Ind. 134; *Brown v. Jones*, 3 Port. (Ala.) 420; *Glover v. Robbins*, 49 Ala. 220; *Lamar v. Brown*, 56 Ala. 157; *Owen v. Hall*, 70 Md. 97, 16 Atl. 376; *Farmers' Nat. Bank of Adams v. Thomas*, 79 Hun, 595, 29 N. Y. Supp. 837; *Meise v. Doscher*, 83 Hun, 580, 31 N. Y. Supp. 1072; *Boustead v. Cuyler*, 116 Pa. St. 551, 8 Atl. 848; *Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946; *Id.*, 37 S. C. 145, 15 S. E. 714, and 16 S. E. 770; *Farmers' & Merchants' Nat. Bank v. Novich*, 89 Tex. 381, 34 S. W. 914; *McVey v. Ely*, 5 B. J. Lea (Tenn.) 438; *Capital Bank v. Armstrong*, 62 Mo. 59; *Iron Mountain Bank v. Murdock*, *Id.* 70; *Presbury v. Michael*, 33 Mo. 542; *Evans v. Foreman*, 60 Mo. 449; *Halcrow v. Kelly*, 28 U. C. C. P. 551. Especially where the contrary was agreed, *Washington Sav. Bank v. Ecky*, 51 Mo. 272; or where it had been originally printed in the note, and erased before execution, *Kilkelly v. Martin*, 34 Wis. 525.

¹⁶² *Locknane v. Emmerson*, 11 Bush (Ky.) 69; *Warpole v. Ellison*, *supra*; *Plyler v. Elliott*, 19 S. C. 257.

¹⁶³ *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523.

¹⁶⁴ *Hoopes v. Collingwood*, 10 Colo. 107, 13 Pac. 909; *Shanks v. Albert*, 47 Ind. 461; *Little Rock Trust Co. v. Martin*, 57 Ark. 277, 21 S. W. 468; *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984; *Derr v. Keaough*, 96 Iowa, 397, 65 N. W. 339. And see § 1768, *infra*.

¹⁶⁵ *Brooks v. Allen*, 62 Ind. 401; or a clause acknowledging interest paid to maturity. *Hert v. Oehler*, 80 Ind. 83.

¹⁶⁶ E. g. "from date" instead of "from maturity," *Black v. Bowman*, 15 Ill. App. 166; *Fraker v. Cullum*, 21 Kan. 555; although it had been so agreed, *Otto v. Halff*, 89 Tex. 384, 34 S. W. 910, reversing (Fed. Civ. App.) 32 S. W. 1052; or from "April 1st" to "May 1st," *Benedict v. Miner*, 58 Ill. 19; or by making it payable semiannually, *Dewey v. Reed*, 40 Barb. (N. Y.) 16; *Neff v. Horner*, 63 Pa. St. 327; or even by adding the words "after maturity," *Coburn v. Webb*, 56 Ind. 96; or annually, *Marsh v. Griffin*, 42 Iowa, 403; *Leonard v. Phillips*, 39 Mich. 182; *Kennedy v. Moore*, 17 S. C. 464; or erasing them, *Dietz v. Harder*, 72 Ind. 208; *Page v. Danaher*, 43 Wis. 221; or by changing the rate, *Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362.

¹⁶⁷ *Bowman v. Mitchell*, 79 Ind. 84; *Harsh v. Klepper*, 28 Ohio St. 200; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. St. 564, 32 Atl. 730; *Post v. Losey*, 111 Ind. 74, 12 N. E. 121; or inserting a higher than legal rate, where no rate was named, *Draper v. Wood*, 112 Mass. 315; *Lee v. Starbird*, 55 Me. 491; *Ivory v. Michael*, 33 Mo. 398; *Warrington v. Early*, 2 El. & Bl. 763; or after the

such clause,¹⁶⁸ or by reducing the rate named.¹⁶⁹ But the indorsement of a memorandum, reducing the rate of interest without the surety's consent, is not such alteration as will discharge him.¹⁷⁰ And it has been held not to be material if an interest clause is inserted as intended by the parties.¹⁷¹ But such alteration made fraudulently in a certificate of deposit has been held to be a material one.¹⁷²

Alteration of Date.

§ 1757. An alteration of date is, in like manner, material, and avoids the instrument;¹⁷³ especially where the maturity of the paper is affected by it.¹⁷⁴ But it has been held to be material with-

printed words "with interest at," *Holmes v. Trumper*, 22 Mich. 427; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538; or erasing a lower rate expressed, *Moore v. Hutchinson*, 60 Mo. 429. But adding a rate which is illegal is without effect, and will not discharge other parties. *Keene v. Miller* (Ky.) 45 S. W. 1041.

¹⁶⁸ *Patterson v. McNeeley*, 16 Ohio St. 348.

¹⁶⁹ *Benj. Chalm. Dig. art. 247*; *Sutton v. Toomer*, 7 Barn. & C. 416; *Whitmer v. Frye*, 10 Mo. 348.

¹⁷⁰ *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77.

¹⁷¹ *First Nat. Bank of Port Huron v. Carson*, 60 Mich. 432, 27 N. W. 589. E. g. by filling a blank with the legal rate. *First Nat. Bank of Oakland v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Rainbolt v. Eddy*, 34 Iowa, 440.

¹⁷² *Woodworth v. Anderson*, 63 Iowa, 503, 19 N. W. 296.

¹⁷³ *Chit. Bills*, 209; 2 *Daniel, Neg. Inst.* 386; 2 *Pars. Notes & B.* 550; *Walton v. Hastings*, 4 Camp. 223, 1 *Starkie*, 215; *Outhwaite v. Luntley*, 4 Camp. 179; *Master v. Miller*, 4 *Term R.* 320; *Vance v. Lowther*, 1 *Exch. Div.* 176; *Wood v. Steele*, 6 *Wall.* 80; *Rogers v. Vosburgh*, 87 N. Y. 228; *Evans v. Deming*, 20 N. Y. *Wkly. Dig.* 71; *Bland v. O'Hagan*, 64 N. C. 471; *McMillan v. Hefferlin*, 18 *Mont.* 385, 45 *Pac.* 548; *Newman v. King*, 54 *Ohio St.* 273, 43 N. E. 683; *Miller v. Stark*, 148 *Pa. St.* 164, 23 *Atl.* 1058; *Aubuchon v. McKnight*, 1 *Mo.* 312; *Britton v. Dierker*, 46 *Mo.* 591; *Hervey v. Harvey*, 15 *Me.* 357; *Kennedy v. Bank*, 18 *Pa. St.* 347; *Warren v. Layton*, 3 *Har. (Del.)* 404; *Fraker v. Cullum*, 21 *Kan.* 555; *Gladstone v. Dew*, 9 *U. C. C. P.* 439. So, before the bills of exchange act of 1882. *Leeds & Co. Bank v. Walker*, 11 *Q. B. Div.* 84. And see § 84, *supra*. But see, *contra*, as to date of indorsement, *Griffith v. Cox*, 1 *Overt. (Tenn.)* 210.

¹⁷⁴ *Crawford v. Bank*, 100 N. Y. 50, 2 N. E. 881, affirming 49 N. Y. *Super. Ct.* 68; *Wyman v. Yeomans*, 84 *Ill.* 403; *United States Bank v. Russel*, 3 *Yeates (Pa.)* 391. Although the original date would mature on Sunday. *Stephens v. Graham*, 7 *Serg. & R. (Pa.)* 505. But not where the maturity was only ex-

out regard to any change in the maturity of the paper.¹⁷⁵ So, a surety will be discharged by a change of date for the purpose of making the interest run for a longer time;¹⁷⁶ or even by a correction on the maker's part to the actual date when the note was made.¹⁷⁷ But where a date is altered without the holder's knowledge, by a draftsman, to the date actually intended, and the original date is restored at the maker's suggestion, the note will be good as against him.¹⁷⁸ So, it is not a material alteration to prefix to a note the place where it was made.¹⁷⁹

Alteration in Time of Payment.

§ 1758. An alteration in the time of payment of a bill is material,¹⁸⁰ whether the time of its running is thereby shortened¹⁸¹ or lengthened.¹⁸² So, the erasure of a contemporaneous memorandum, making the note payable in installments, will defeat a recovery upon

tended one day, so as to fall on the discount day of the bank. *Union Bank v. Cook*, 2 Cranch, C. C. 218, Fed. Cas. No. 14,349.

¹⁷⁵ *Low v. Merrill*, 1 Pin. (Wis.) 340.

¹⁷⁶ *Benedict v. Miner*, 58 Ill. 19. So, where the note was intentionally post-dated, with interest "after maturity," and it was afterwards altered to the actual date. *Hamilton v. Wood*, 70 Ind. 306; *Hamilton v. Hooper*, 46 Iowa, 515.

¹⁷⁷ *Hocker v. Jamison*, 2 Watts & S. (Pa.) 438; *Brown v. Reed*, 79 Pa. St. 370; *Miller v. Gilleland*, 19 Pa. St. 110; *Bowers v. Jewell*, 2 N. H. 543; *Brown v. Straw*, 6 Neb. 536; *Henderson v. Wilson*, 6 How. (Miss.) 65.

¹⁷⁸ *Collins v. Makepeace*, 13 Ind. 448.

¹⁷⁹ *Houston v. Potts*, 64 N. C. 33. But altering the local date of a note is material, and renders it void. *McQueen v. McIntyre*, 30 U. C. C. P. 426.

¹⁸⁰ *Benj. Chalm. Dig. art. 247*; *Chit. Bills*, 216; 2 *Daniel, Neg. Inst.* 388; *Walton v. Hastings*, 4 Camp. 223; *Paton v. Winter*, 1 Taunt. 420; *Ives v. Bank*, 2 Allen (Mass.) 236; *Hervey v. Harvey*, 15 Me. 357; *Norwalk Bank v. Adams Exp. Co.*, 4 Blatchf. 455, Fed. Cas. No. 10,354; *King v. Hunt*, 13 Mo. 97; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 537; *Westloh v. Brown*, 43 U. C. Q. B. 402.

¹⁸¹ *Alderson v. Langdale*, 3 Barn. & Ald. 660; *Clifford v. Parker*, 2 Man. & G. 909; *Taylor v. Taylor*, 12 Lea (Tenn.) 714. E. g. by cutting off the days of grace. *Steinau v. Moody*, 100 Ga. 136, 28 S. E. 30.

¹⁸² *Davis v. Jenney*, 1 Metc. (Mass.) 221; *Desbrow v. Weatherley*, 6 Car. & P. 758; *Stayner v. Joice*, 82 Ind. 35; *Douglas v. Scott*, 8 Leigh (Ky.) 43; *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113. But see, contra, *Drexler v. Smith*, 30 Fed. 754, as against maker.

it.¹⁸³ And it is a material alteration to make it payable "after sight" instead of "after date,"¹⁸⁴ or to add the words "on demand."¹⁸⁵ But, if no time of payment is expressed, the addition of "upon demand" will not be material.¹⁸⁶ So, it is material to change a note payable on demand so as to make it payable one day after date.¹⁸⁷

Alteration in Place of Payment.

§ 1759. It is a material alteration to add a place of payment, where none is expressed,¹⁸⁸ especially by making a note payable at bank, where that makes it negotiable.¹⁸⁹ So, it is a material alteration to change the place of payment expressed in the paper.¹⁹⁰ But it has been held not to be material to erase the place of payment expressed, since the rights of the defendant are only enlarged by so doing.¹⁹¹ Even where, by statute, the acceptance of a bill is a general acceptance, although a place of payment is named generally, it will still be a material alteration to insert a place of payment in an

¹⁸³ Bay v. Shrader, 50 Miss. 326.

¹⁸⁴ Chit. Bills, 209, 211; Long v. Moore, 3 Esp. 155, note.

¹⁸⁵ Benjamin v. Delahay, 9 Ill. 536; Farmers' Nat. Bank v. Thomas, 79 Hun, 595, 29 N. Y. Supp. 837.

¹⁸⁶ Benj. Chalm. Dig. art. 247; Aldous v. Cornwell, L. R. 3 Q. B. 573. So, the addition of "when called on" to such a note. Gist v. Gans, 30 Ark. 288.

¹⁸⁷ Lee v. Murdoch, 4 Pat. App. 261.

¹⁸⁸ Nazro v. Fuller, 24 Wend. (N. Y.) 374; Charlton v. Reed, 61 Iowa, 166, 16 N. W. 64; Oakey v. Wilcox, 3 How. (Miss.) 330; Southwark Bank v. Gross, 35 Pa. St. 80; Toomer v. Rutland, 57 Ala. 379; Sudler v. Collins, 2 Houst. (Del.) 538; Townsend v. Wagon Co., 10 Neb. 615, 7 N. W. 274; Winter v. Pool, 100 Ala. 503, 14 South. 411; Pelton v. Lumber Co., 113 Cal. 21, 45 Pac. 12; Simmons v. Atkinson & Lampton Co., 69 Miss. 862, 12 South. 263; unless explained by the holder, Hill v. Cooley, 46 Pa. St. 259; or unless it is what the law would imply, Schuler v. Gillette, 12 Hun (N. Y.) 278; or for the convenience of all parties, Etz v. Place, 81 Hun, 203, 30 N. Y. Supp. 765.

¹⁸⁹ Shanks v. Albert, 47 Ind. 461; McCoy v. Lockwood, 71 Ind. 319; Ballard v. Insurance Co., 81 Ind. 239; Cronkhite v. Nebeker, Id. 319; Morehead v. Bank, 5 W. Va. 74.

¹⁹⁰ Adair v. Egland, 58 Iowa, 314, 12 N. W. 277; Charlton v. Reed, 61 Iowa, 166, 16 N. W. 64; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392; McQueen v. McIntyre, 30 U. C. C. P. 426.

¹⁹¹ Major v. Hansen, 2 Bliss. 195, Fed. Cas. No. 8,982. But see 2 Daniel, Neg. Inst. 389.

acceptance, where none is named, and the acceptor will be discharged by such alteration.¹⁹² So, it is material to alter the place of payment named in an acceptance, although it is done because the house originally named had become insolvent.¹⁹³ But it is not material to write the acceptor's address under his signature after acceptance.¹⁹⁴

Alteration of Memorandum.

§ 1760. A material alteration must change some essential part of the contract, and not a mere memorandum or earmark only.¹⁹⁵ In many cases the addition of a memorandum to a bill is not a material alteration.¹⁹⁶ Thus, it is not material to add a memorandum that certain interest is to be refunded if the note is paid before maturity;¹⁹⁷ or to indorse a statement as to the wife's property, on the strength of which the credit was given.¹⁹⁸ And a surety will not be discharged by an unauthorized memorandum made by an

¹⁹² Byles, Bills, 324; Benj. Chalm. Dig. art. 247; Chit. Bills, 309; 2 Daniel, Neg. Inst. 390; Cowie v. Halsall, 4 Barn. & Ald. 197; Calvert v. Baker, 4 Mees. & W. 417; Crotty v. Hodges, 4 Man. & G. 361; Burchfield v. Moore, 3 El. & Bl. 683; Desbrow v. Weatherley, 6 Car. & P. 758, 1 Moody & R. 438; Taylor v. Moseley, Id. 439, note; Hanbury v. Lovett, 18 Law T. (N. S.) 366; McIntosh v. Haydon, Ryan & M. 362; Whitesides v. Bank, 10 Bush (Ky.) 501. But see, contra, McDowall v. Boyd, 17 Law J. Q. B. 295; Trapp v. Spearman, 3 Esp. 57. And as to such addition by a memorandum at the foot of the bill, or in a blank left, see *infra*.

¹⁹³ Benj. Chalm. Dig. art. 247; Tidmarsh v. Grover, 1 Maule & S. 735. And such alteration amounts to a forgery. Rex v. Treble, 2 Taunt. 329, Russ. & R. 164.

¹⁹⁴ Marson v. Petit, 1 Camp. 82, note.

¹⁹⁵ 2 Pars. Notes & B. 544.

¹⁹⁶ E. g. that the note was "left with A. as collateral," Bachellor v. Priest, 12 Pick. (Mass.) 399; or was to be paid "at G. Bros., Jan. 10," American Nat. Bank of New York v. Bangs, 42 Mo. 450; or had been discharged for a smaller sum than its face, "and should be so read," Merchants' & Mechanics' Bank v. Evans, 9 W. Va. 373; or by an indorsement of payment, Howe v. Thompson, 11 Me. 152; or a pencil memorandum as to the consideration, Maness v. Henry, 96 Ala. 454, 11 South. 410; or adding an erroneous due date, Fanshawe v. Peet, 26 Law J. Exch. 314. So, although the note was not dated, and was payable two months after date, and a memorandum was made of the correct date of maturity. Fitch v. Jones, 5 El. & Bl. 238.

¹⁹⁷ Herrick v. Baldwin, 17 Minn. 209 (Gil. 183).

¹⁹⁸ Krouskop v. Shontz, 51 Wis. 204, 8 N. W. 241.

agent, after maturity of the note, as to the subsequent payment of interest.¹⁹⁹ So, it has been held immaterial to change a memorandum on a note, to the effect that it was "subject of" a certain contract, so as to read "subject to" it.²⁰⁰ And an agreement, indorsed by the maker of a note, binding himself to pay a higher rate of interest, is not an alteration which will affect or discharge a surety, although made without his consent.²⁰¹ In like manner, the cutting off of a mere memorandum is often immaterial.²⁰² In many cases, however, the adding of a memorandum on the margin of a note is material, and discharges a surety or other party not consenting.²⁰³ So, the cutting off of a condition annexed to the note and written on the same paper;²⁰⁴ or the erasing of a memorandum that the interest has been paid;²⁰⁵ or the cutting off of a statement of account which formed the consideration of the note written below it.²⁰⁶ A material

¹⁹⁹ Although paid in accordance with the memorandum, *Nickerson v. Swett*, 135 Mass. 514.

²⁰⁰ *Cushing v. Field*, 70 Me. 50.

²⁰¹ *Bucklen v. Huff*, 53 Ind. 474.

²⁰² E. g. directing credit of proceeds to the drawer. *Hubbard v. Williamson*, 27 N. C. 397. So, an erasure of the word "renewal," *Hall v. Hale*, 8 Conn. 336; or an indorsement of a payment afterwards applied to another debt, *Kimball v. Lamson*, 2 Vt. 138.

²⁰³ *Warren v. Fant*, 79 Ky. 1; e. g. a memorandum of payment in excess of the note, *Johnston v. May*, 76 Ind. 293; or a place of payment, *Woodworth v. Bank*, 19 Johns. (N. Y.) 391, reversing 18 Johns. (N. Y.) 315; or a provision for payment in installments, *Bay v. Shrader*, 50 Miss. 326; or payment of interest, *Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946; *Id.*, 37 S. C. 145, 15 S. E. 714, and 16 S. E. 770; or payment of interest annually, *Warrington v. Early*, 23 Law J. Q. B. 47; or a trustee's certificate required by the terms of a bond, *Maas v. Railway Co.*, 83 N. Y. 223, affirming 11 Hun (N. Y.) 8. But not a memorandum as to payment of interest signed by one joint maker, and intended (and held) to be binding on him only. *Littlefield v. Coombs*, 71 Me. 110.

²⁰⁴ *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523; e. g. that it was to be paid out of certain profits, *Benedict v. Cowden*, 49 N. Y. 396; or might be paid partly in stock in one year, or all cash in two years, *Wheelock v. Freeman*, 13 Pick. (Mass.) 165; or was not to be collected until taken up by A., who had received funds from the maker for the purpose, *Johnson v. Heagan*, 23 Me. 329.

²⁰⁵ *Hert v. Oehler*, 80 Ind. 83; or the erasure of the cancellation stamp, with a fraudulent reissue of the paper. *District of Columbia v. Cornell*, 130 U. S. 655, 9 Sup. Ct. 694. This is not so, however, as to such marks stamped on a note by mistake. *Whitlock v. Manciet*, 10 Or. 166.

²⁰⁶ *Benjamin v. McConnel*, 9 Ill. 536.

alteration in a contract will, in like manner, discharge a note given as collateral security.²⁰⁷ And a note secured by collateral mortgage will be discharged by a material alteration of the mortgage.²⁰⁸

Alteration of Seal—Attestation.

§ 1761. It is a material alteration to add a seal to a note.²⁰⁹ And if one maker adds a seal to his signature after execution and in the absence of the other makers, it will render the note void as to them.²¹⁰ So, if one signs a blank note with the intention of becoming a surety, and delivers it to the principal with that intention, and he adds a seal to both signatures, he will discharge the surety.²¹¹ But if a seal is added by the maker's agent without authority, under a mistake, it will be ineffectual and immaterial.²¹² The destruction or obliteration of a seal is also a material alteration.²¹³

So, if signatures of persons who were not present at the signing of a note are added as attesting witnesses, it will render the note void.²¹⁴ And it will be a material alteration to cut off the name of genuine attesting witnesses.²¹⁵ But many cases hold that a note is not affected by adding attesting witnesses afterwards, if it is done without fraud.²¹⁶ So, where an attorney, who witnessed the signature, afterwards wrote the word "witness," but neglected to sign

²⁰⁷ *Brigham v. Wentworth*, 11 Cush. (Mass.) 123.

²⁰⁸ *Williams v. Barrett*, 52 Iowa, 637, 3 N. W. 690. But see, contra, *Klme v. Jesse*, 52 Neb. 606, 72 N. W. 1050.

²⁰⁹ *Morrison v. Welty*, 18 Md. 169; *Maas v. Railway Co.*, 83 N. Y. 223; *Vaughan v. Fowler*, 14 S. C. 355. So, if added to a guaranty, *Davidson v. Cooper*, 11 Mees. & W. 778, 13 Mees. & W. 343. And see § 70, supra. But not where private seals are abolished by statute. *Jordan v. Jordan*, 10 Lea (Tenn.) 124; TENNESSEE (Shannon's Code, § 3213).

²¹⁰ *Blery v. Haines*, 5 Whart. (Pa.) 563.

²¹¹ *Smith v. Carder*, 33 Ark. 709.

²¹² *Fullerton v. Sturges*, 4 Ohio St. 529.

²¹³ *Porter v. Doby*, 2 Rich. Eq. (S. C.) 49; *Piercy's Heirs v. Piercy*, 5 W. Va. 199.

²¹⁴ *Marshall v. Gougler*, 10 Serg. & R. (Pa.) 164; *Brackett v. Mountfort*, 11 Me. 115; *Homer v. Wallis*, 11 Mass. 300. So of a bond. *Adams v. Frye*, 3 Mete. (Mass.) 103.

²¹⁵ *Sharpe v. Bagwell*, 16 N. C. 115.

²¹⁶ *Eddy v. Bond*, 19 Me. 461; *Thornton v. Appleton*, 29 Me. 298; e. g. if subsequently added by one who saw the note signed, *Milbery v. Storer*, 75 Me.

the note.²¹⁷ So, it is not material if a second witness is added to a note already attested.²¹⁸ And, where an attestation is added before the delivery to the payee without the knowledge of either party, it will not affect the instrument, and may be stricken out.²¹⁹ And, if the attestation has no legal effect where the note is made, the adding of a witness' name will be immaterial, whatever the intention was in writing it.²²⁰

Alteration in Number—Stamp.

§ 1762. Changing the number of a bond or bank note, which is one of a series, is not a material alteration.²²¹ And such alteration will constitute no defense against a bona fide holder who has received payment from the maker.²²² So, a note is not materially altered by being afterwards stamped by a collector.²²³ And it will be valid in the hands of a bona fide holder, although the stamp was put on without authority of the maker.²²⁴

Alteration Discharges Debt.

§ 1763. The holder of a bill of exchange, after materially altering it, cannot recover either on the bill or on the original consideration.²²⁵

69; *Rollins v. Bartlett*, 20 Me. 319; the note being still treated as an unattested note.

²¹⁷ *Smith v. Dunham*, 8 Pick. (Mass.) 246.

²¹⁸ *Ford v. Ford*, 17 Pick. (Mass.) 418.

²¹⁹ *Church v. Fowle*, 142 Mass. 12, 6 N. E. 764.

²²⁰ *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907.

²²¹ *Com. v. Emigrant Industrial Sav. Bank*, 98 Mass. 12; *Wylie v. Railway Co.*, 41 Fed. 623. And see *Morgan v. U. S.*, 113 U. S. 476, 5 Sup. Ct. 588. But see, contra, *Suffell v. Bank*, 9 Q. B. Div. 535, reversing 7 Q. B. Div. 270, as to Bank of England notes, such numbers being an important means of identification. See, however, *Leeds & Co. Bank v. Walker*, 11 Q. B. Div. 84, as to effect in later cases of section 64 of the bills of exchange act.

²²² *City of Elizabeth v. Force*, 29 N. J. Eq. 587, reversing 28 N. J. Eq. 403. But see, contra, where the change was not apparent, *Birdsall v. Russell*, 29 N. Y. 220.

²²³ *Crews v. Bank*, 31 Grat. (Va.) 348.

²²⁴ *Blackwell v. Denie*, 23 Iowa, 63.

²²⁵ *Byles, Bills*, 228; *Benj. Chalm. Dig. art. 249*; *Chit. Bills*, 211; 2 *Daniel, Neg. Inst.* 424; *Alderson v. Langdale*, 3 Barn. & Adol. 660; *Wheelock v. Free-*

And an indorsee after maturity is barred, in like manner, as to the original consideration.²²⁶ And in such case the holder has no right of recovery in equity.²²⁷ A fraudulent and material alteration discharges both the note and the debt,²²⁸ but even a fraudulent alteration will not vitiate the paper, if it is immaterial.²²⁹ On the other hand, an alteration made by the drawer of a bill in order to make it accord with the original agreement or intention does not discharge the debt, although it may render the bill itself void.²³⁰ But, if there is no privity between the parties as to the original debt, there can be no recovery upon it, e. g. in a suit by an indorsee against the drawee.²³¹ On the other hand, even the fraudulent alteration of a

man, 13 Pick. (Mass.) 165; *Black v. Bowman*, 15 Ill. App. 166; *Martendale v. Follet*, 1 N. H. 95; *Whitmer v. Frye*, 10 Mo. 348; *White v. Hass*, 32 Ala. 430; *Taylor v. Taylor*, 12 Lea (Tenn.) 714; *Gladstone v. Dew*, 9 U. C. C. P. 439; *Lee v. Murdoch*, 4 Pat. App. 261. Especially on a sealed note. *Mills v. Starr*, 2 Bailey (S. C.) 359.

²²⁶ *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1.

²²⁷ *Sharpe v. Bagwell*, 16 N. C. 115.

²²⁸ *Meyer v. Huneke*, 55 N. Y. 412; *Smith v. Mace*, 44 N. H. 553; *Ballard v. Insurance Co.*, 81 Ind. 239; *Woodworth v. Anderson*, 63 Iowa, 503, 19 N. W. 296; *Walton Plow Co. v. Campbell*, 35 Neb. 174, 52 N. W. 883; *First Nat. Bank of Decorah v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

²²⁹ *Moye v. Herndon*, 30 Miss. 110.

²³⁰ *Bytes*, Bills, 328; *Benj. Chalm. Dig. art. 249*; *Chit. Bills*, 211, 220; 2 *Daniel*, Neg. Inst. 424; 1 *Edw. Bills & N.* § 263; 2 *Pars. Notes & B.* 572; *Sloman v. Oox*, 1 *Crompt. M. & R.* 471, 5 *Tyrw.* 174; *Hunt v. Gray*, 35 N. J. Law, 227; *York v. Janes*, 43 N. J. Law, 332; *Lewis v. Schenck*, 18 N. J. Eq. 459; *Vogle v. Ripper*, 34 Ill. 100; *Wallace v. Wallace*, 8 Ill. App. 69; *Clough v. Seay*, 49 Iowa, 111; *Morrison v. Huggins*, 53 Iowa, 76, 4 N. W. 854; *Sullivan v. Rudisill*, 63 Iowa, 158, 18 N. W. 856; *Merrick v. Boury*, 4 Ohio St. 60; *Matteson v. Ellsworth*, 33 Wis. 488; *Warren v. Layton*, 3 Har. (Del.) 404; *State Sav. Bank v. Shaffer*, 9 Neb. 1, 1 N. W. 980; *McClure v. Little*, 15 Utah, 379, 49 Pac. 298. So, where the payee's agent made an alteration supposing he was authorized to do so, *Krause v. Meyer*, 32 Iowa, 506; *Morrison v. Welty*, 18 Md. 169; or where the alteration was made by one maker, *Murray v. Graham*, 29 Iowa, 520; or where all parties consented to it, *Sutton v. Toomer*, 7 Barn. & C. 416; or where the alteration was afterwards waived, *Pritchard v. Smith*, 77 Ga. 463; or was not material, *First Nat. Bank of Port Huron v. Carson*, 60 Mich. 432, 27 N. W. 589; or was made in good faith, *Miller v. Stark*, 148 Pa. St. 164, 23 Atl. 1058; *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446. And a note altered without fraud is still a thing of value, and may be recovered in trover. *Booth v. Powers*, 56 N. Y. 22, reversing 59 Barb. (N. Y.) 331.

²³¹ *Long v. Moore*, 3 Esp. 155, note.

note by one of the makers will not prevent recovery by foreclosure of a collateral mortgage.²³²

Whether the alteration is fraudulent is a question for the jury.²³³ Where it has been made by the holder, it will raise a presumption that the original instrument was against his interest.²³⁴ But, if it is made in good faith by the drawer after acceptance, it will not discharge the acceptor from his liability to the drawer on the original consideration.²³⁵ It has been held that an instrument, rendered void by alteration, is not available as evidence for any purpose.²³⁶ And even nominal damages cannot be recovered, where there is no evidence outside of the altered instrument.²³⁷

Alteration by a Stranger.

§ 1764. Even an alteration made by a stranger, while the instrument is in the custody of the owner, has been held to render it void because of the supposed negligence of the owner.²³⁸ But in the United States alteration by a stranger is a mere spoliation, and does not discharge the parties.²³⁹ But a special action on the case, or, per-

²³² *Gillette v. Smith*, 18 Hun (N. Y.) 10.

²³³ *Bowers v. Jewell*, 2 N. H. 543. So, where the alteration is apparent. *Beaman v. Russell*, 20 Vt. 210.

²³⁴ *Love v. Dilley*, 64 Md. 238, 1 Atl. 50, and 4 Atl. 290. But, if the alteration is against the holder's interest (e. g. in reducing the rate of interest), it will be prima facie evidence of his good faith. *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446.

²³⁵ *Atkinson v. Hawdon*, 2 Adol. & E. 628; *Lewis v. Kramer*, 3 Md. 265.

²³⁶ *Jardine v. Payne*, 1 Barn. & Adol. 671; *Sweeting v. Halse*, 9 Barn. & C. 365, 4 Man. & R. 287; *Jones v. Ryder*, 4 Mees. & W. 32, overruling *Bishop v. Chambre*, 1 Dans. & L. 83, 3 Car. & P. 55; *Sutton v. Toomer*, 7 Barn. & C. 416.

²³⁷ *Chlt. Bills*, 220; *Green v. Davies*, 4 Barn. & C. 235.

²³⁸ *Byles, Bills*, 323; *Chlt. Bills*, 209; 2 Daniel, Neg. Inst. 383; 2 Pars. Notes & B. 575; *Davidson v. Cooper*, 11 Mees. & W. 778, affirmed in 13 Mees. & W. 343; *Bank of Hindostan v. Smith*, 36 Law J. C. P. 241; *Master v. Miller*, 4 Term R. 320; *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524.

²³⁹ 2 Daniel, Neg. Inst. 384; 1 Edw. Bills & N. § 245; 2 Pars. Notes & B. 574; *Colson v. Arnot*, 57 N. Y. 253; *Davis v. Carlisle*, 6 Ala. 707; *Langenberger v. Kroeger*, 48 Cal. 147; *Lee v. Alexander*, 9 B. Mon. (Ky.) 25; *Brooks v. Allen*, 62 Ind. 401; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Robinson v. Berryman*, 22 Mo. App. 509; *Piersol v. Grimes*, 30 Ind. 129; *U. S. v. Spalding*, 2

haps, an action of trover, will lie against the person making such alteration.²⁴⁰ If an option to take bonds, indorsed on a bond and rendering it nonnegotiable, is erased by a thief, the erasure will have no effect.²⁴¹ So, a bill will not be rendered void because it is altered by the holder's agent without authority,²⁴² or by a justice of the peace, before whom suit was brought upon it.²⁴³ And, if one maker fraudulently erases his name without the knowledge of the holder, it will not discharge his co-maker.²⁴⁴

But if the payee's agent alters the note after its delivery to him, and before delivering it to the payee, it will render it void.²⁴⁵ So, a surety will be discharged by an alteration made by one who afterwards became the holder,²⁴⁶ or by one of several joint holders.²⁴⁷ And in some states the statute provides that banks shall be liable to a bona fide holder for the original amount of any circulating bank note issued by them, and raised in the course of its circulation.²⁴⁸

Alteration by Mistake—Correction.

§ 1765. The accidental erasure of an indorsement will not affect the liability of parties.²⁴⁹ So, the accidental stamping of a waiver

Mason, 478, Fed. Cas. No. 16,365; *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969; *Andrews v. Calloway*, 50 Ark. 358, 7 S. W. 449; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528. And the note may be declared on as originally made. *Drum v. Drum*, 133 Mass. 506. But the payee's clerk or agent is not a stranger to the paper in such sense. *Eckert v. Louis*, 84 Ind. 99; *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446. And if the holder afterwards sues on the note as altered by a stranger, he thereby ratifies the alteration, and forfeits his remedy on the original instrument. *Perkins Windmill & Ax Co. v. Tillman* (Neb.) 75 N. W. 1098.

²⁴⁰ *Chit. Bills*, 220; *Paton v. Winter*, 1 Taunt. 420.

²⁴¹ *Dinsmore v. Duncan*, 57 N. Y. 573.

²⁴² *Ballard v. Insurance Co.*, 81 Ind. 239; *Bigelow v. Stilphen*, 35 Vt. 521. But see *Morrison v. Welty*, 18 Md. 169.

²⁴³ *Boyd v. McConnell*, 10 Humph. 68.

²⁴⁴ *Daniel v. Daniel*, Dud. (Ga.) 239.

²⁴⁵ *Hamilton v. Hooper*, 46 Iowa, 515.

²⁴⁶ *Brooks v. Allen*, 62 Ind. 401.

²⁴⁷ *Thompson v. Massie*, 41 Ohio St. 307.

²⁴⁸ MASSACHUSETTS (Pub. St. c. 118, § 75); MAINE (Rev. St. c. 47, § 32).

²⁴⁹ *Brett v. Marston*, 45 Me. 401.

over two indorsements instead of one,²⁵⁰ or the cancellation of a note by the bank on payment by an indorser,²⁵¹ or by the payee;²⁵² or of an acceptance by the referee in case of need.²⁵³ So, an alteration made by an agent by mistake as to his supposed authority.²⁵⁴

If a special indorsee, acting as agent to sell a bill for the drawer, erases the special indorsement upon the sale by him, he may afterwards, on taking up the bill, restore the indorsement and recover as indorsee.²⁵⁵ So, where a payee, desiring to transfer a note to his daughter, ignorantly erases his own name and substitutes hers, and afterwards restores his name as payee, and indorses it regularly, the indorsee may recover notwithstanding the alteration.²⁵⁶ So, it may be proved that a mutilation was made by accident by an infant child of the holder;²⁵⁷ or that erasures were made to carry out a proposed compromise entered into by the holder's agent, and not confirmed by the holder.²⁵⁸ In general, an alteration made merely to correct a mistake is not material and does not avoid the instrument.²⁵⁹ But whether the intention was to vary the contract or

²⁵⁰ *Gordon v. Bank*, 144 U. S. 97, 12 Sup. Ct. 657.

²⁵¹ *Whitlock v. Manciet*, 10 Or. 166.

²⁵² *Boulware v. Bank*, 12 Mo. 542.

²⁵³ The mistake being at once corrected and noted. *Raper v. Birkbeck*, 15 East, 17.

²⁵⁴ *Broughton v. Fuller*, 9 Vt. 373; *Brooks v. Allen*, 62 Ind. 401; *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501.

²⁵⁵ *Nevins v. De Grand*, 15 Mass. 436.

²⁵⁶ *Horst v. Wagner*, 43 Iowa, 373.

²⁵⁷ *Frazer v. Boss*, 66 Ind. 1; *Rhoads v. Frederick*, 8 Watts (Pa.) 448.

²⁵⁸ *Abbe v. Rood*, 6 McLean, 106, Fed. Cas. No. 6.

²⁵⁹ *Byles*, Bills, 435; *Benj. Chalm. Dig.* art. 248; *Chlt. Bills*, 212; 2 *Daniel*, Neg. Inst. 426; 2 *Pars. Notes & B.* 569; *Gardner v. Walsh*, 5 El. & Bl. 83; *Bathe v. Taylor*, 15 East, 416; *Webber v. Maddocks*, 3 Camp. 1; *Cole v. Hills*, 44 N. H. 227; *Shepard v. Whetstone*, 51 Iowa, 457, 1 N. W. 753. E. g. to correct a misdescription of the land for which the note was given, *McRaven v. Crisler*, 53 Miss. 542; or a misnomer, *Derby v. Thrall*, 44 Vt. 413; or a misplaced signature, *Ryan v. Bank*, 148 Ill. 349, 35 N. E. 1120; *Fisher v. King*, 153 Pa. St. 3, 25 Atl. 1029; *Lynch v. Hicks*, 80 Ga. 200. 4 S. E. 235; or an unauthorized signature, *Waldorf v. Simpson*, 15 App. Div. 297, 44 N. Y. Supp. 921; or attestation, *Church v. Fowle*, 142 Mass. 12, 6 N. E. 764; or a date, *Ames v. Colburn*, 11 Gray (Mass.) 390; *Duker v. Franz*, 7 Bush (Ky.) 273; *Jessup v. Dennison*, 2 Disn. (Ohio) 150; or to fill in the number of months the bill is to run, *Conner v. Routh*, 7 How. (Miss.) 176; or to change "other" to

merely correct a mistake is a question for the jury.²⁶⁰ And the erasure may be explained by parol evidence.²⁶¹ And a court of equity may direct the reform of an instrument by an alteration correcting a mistake of the drawer, even upon application of the drawer himself.²⁶²

Consent to Alteration.

§ 1766. An alteration is binding upon all parties consenting to it,²⁶³ although other parties not consenting may be discharged.²⁶⁴ So, if a bill is altered at the drawer's request before acceptance, it will not be rendered void.²⁶⁵ And, even where a bill is fraudulently altered by the drawer after indorsement, if it comes again into the indorser's hands, and is afterwards presented by him to the drawee and accepted, the acceptance will be binding.²⁶⁶ And the acceptor will be liable, if the alteration is made by him,²⁶⁷ or with his con-

"order," *Cariss v. Tattersall*, 2 Man. & G. 890; or correct an omission which the law would itself supply, *Hunt v. Adams*, 6 Mass. 519. But see, as to date, *Owings v. Arnot*, 33 Mo. 406; and interest clause, *Evans v. Foreman*, 60 Mo. 449. If made without fraud, it may be restored in equity, *Wallace v. Tice* (Or.) 51 Pac. 733; but only on complete rescission, *Glover v. Green*, 96 Ga. 127, 22 S. E. 664.

²⁶⁰ *Byles, Bills*, 327; *Attwood v. Griffin, Ryan & M.* 425, 2 Car. & P. 368; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93; *Brutt v. Picard, Ryan & M.* 37; *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43. And an alteration fraudulently made will not permit a restoration of the original bill. *McDaniel v. Whitsett*, 96 Tenn. 10, 33 S. W. 567.

²⁶¹ *Bernstien v. Ricks*, 20 La. Ann. 409.

²⁶² *Chit. Bills*, 213; *Ball v. Storie*, 1 Sim. & S. 210.

²⁶³ *Byles, Bills*, 326; *Chit. Bills*, 214; 2 Daniel, Neg. Inst. 412; 2 Pars. Notes & B. 565; *Sherrington v. Jermy*, 3 Car. & P. 374; *Kershaw v. Cox*, 3 Esp. 246; *Downes v. Richardson*, 5 Barn. & Ald. 674; *Tarleton v. Shingler*, 7 C. B. 812; *Catton v. Simpson*, 8 Adol. & E. 136; *Sutton v. Toomer*, 7 Barn. & C. 416; *Crum v. Abbott*, 2 McLean, 233, Fed. Cas. No. 3,454; *Wilson v. Jamieson*, 7 Pa. St. 126; *Grimsted v. Briggs*, 4 Iowa. 559; *King v. Hunt*, 13 Mo. 97; *Pulliam v. Withers*, 8 Dana (Ky.) 98; *Hollis v. Vandergrift*, 5 Houst. (Del.) 521; *Jacobs v. Gilreath*, 45 S. C. 46, 22 S. E. 757; *Landauer v. Improvement Co.* (S. D.) 72 N. W. 467; *Schmelz v. Rix*, 95 Va. 509, 28 S. E. 890.

²⁶⁴ *Warring v. Williams*, 8 Pick. (Mass.) 322.

²⁶⁵ *Chit. Bills*, 212; *Peacock v. Murrell*, 2 Starkie, 558; *Upstone v. Marchant*, 2 Barn. & C. 10, 3 Dowl. & R. 198.

²⁶⁶ *Ward v. Allen*, 2 Metc. (Mass.) 53.

²⁶⁷ E. g. by changing the date. *Johnson v. Duke of Marlborough*, 2 Starkie,

sent,²⁶⁸ although it discharge the drawer and indorsers who do not consent.²⁶⁹ Where a second maker is added in the body of a bond, and signs it under a previous agreement between the first obligor and the holder, the first obligor will not be discharged.²⁷⁰ And, if the maker agrees with the payee to have the note altered, he will not be discharged, although it is actually done without his knowledge and after the time proposed for it.²⁷¹ So, where the amount is changed to restore the note to the original intention of the parties, it will not discharge such parties.²⁷² Some foreign statutes provide expressly that, after a bill has been delivered, it can only be altered by consent of all the parties.²⁷³

The consent of a party may be given afterwards by way of ratification, or its place may be supplied by a waiver, or the party may be barred from objecting to the alteration by acts amounting to an estoppel on his part. These will all be considered more particularly hereafter.

313. So, where the change was made by an accidental flourish of the pen. *Ratcliff v. Bank*, 2 Sneed (Tenn.) 424.

²⁶⁸ Byles, Bills, 324; Chit. Bills, 211; *Stevens v. Lloyd, Moody & M.* 292; *Walter v. Cubley*, 2 Crompt. & M. 151, 4 Tyrw. 87.

²⁶⁹ Byles, Bills, 326; Chit. Bills, 216; *Walton v. Hastings*, 4 Camp. 223, 1 Starkle, 215.

²⁷⁰ *Camden Bank v. Hall*, 14 N. J. Law, 583; *Dodge v. Pringle*, 29 Law J. Exch. 115.

²⁷¹ *Wardlow v. List*, 20 Cent. Law. J. 237.

²⁷² *Clute v. Small*, 17 Wend. (N. Y.) 238. So, the addition of "without recourse," to carry out the original intention. *Luth v. Stewart*, 6 Vlet. Law R. 383.

²⁷³ COLOMBIA (Code Com. art. 391); COSTA RICA (Code Com. art. 380); ECUADOR (Code Com., as in "Spain"); MEXICO (Code Com. art. 328); PERU (Code Com. art. 390); SALVADOR (Code Com. art. 388); SPAIN (Code Com. art. 433).

Consent—How Proved.

§ 1767. Consent to an alteration is a question for the jury,²⁷⁴ and will not be presumed.²⁷⁵ But it need not be in writing,²⁷⁶ except where it involves an agreement (e. g. as to rate of interest) required by the statute to be in writing.²⁷⁷ Parol evidence is admissible to show that the parties sued on a note consented to the alteration,²⁷⁸ or even to prove a parol authority to add "whatever counsel might suggest to make it legal," although the alteration was made afterwards and not shown to the maker.²⁷⁹ An alteration made by the drawer on the authority of the acceptor,²⁸⁰ or by the maker on the authority of a surety,²⁸¹ will bind the party authorizing it. And, if an alteration is consented to by one indorser on condition that the maker get the consent of the other, the first indorser cannot afterwards repudiate the note, although the maker fails to get the other's consent.²⁸² So, where a note is given for an insurance premium, and the maker's policy is increased by his own direction, and the amount of the note is increased to correspond with it by his agent without his knowledge, he will not be allowed to set up such alteration.²⁸³

Consent Implied from Blank.

§ 1768. Where a party executes a bill or note, and delivers it with any material part left blank, an authority to fill such blank

²⁷⁴ 2 Daniel, Neg. Inst. 412; 2 Pars. Bills & N. 565; *Semple v. Cole*, 3 Jur. 208; *Hocker v. Jamison*, 2 Watts & S. (Pa.) 438; *Bailey v. Taylor*, 11 Conn. 531; *Richmond Mfg. Co. v. Davis*, 7 Blackf. (Ind.) 412; *Bowers v. Jewell*, 2 N. H. 543; *Jacobs v. Gilreath*, 45 S. C. 46, 22 S. E. 757.

²⁷⁵ *Humphreys v. Gullow*, 13 N. H. 385; *Toomer v. Rutland*, 57 Ala. 379. But see, contra, where it is merely the striking out of an indorsement, *Warner v. Spencer*, 7 J. J. Marsh. (Ky.) 341.

²⁷⁶ *Stewart v. Bank*, 40 Mich. 348.

²⁷⁷ *Swift v. Barber*, 28 Mich. 503.

²⁷⁸ *Myers v. Nell*, 84 Pa. St. 369.

²⁷⁹ *Taddiken v. Cantrell*, 69 N. Y. 597.

²⁸⁰ *Johnson v. Garnett*, 2 Chit. 122.

²⁸¹ *Prather v. Zulauf*, 38 Ind. 155.

²⁸² *Stoddard v. Penniman*, 113 Mass. 386.

²⁸³ *Merchants' & Manufacturers' Ins. Co. v. Maguire*, 1 Mo. App. 223.

is presumed as against a bona fide holder for value.²⁸⁴ But a space left is not necessarily a blank, and gives no authority to add the words "or his order" after the payee's name,²⁸⁵ or to strike out such words, and insert in a space between them and the name the words "or bearer."²⁸⁶ So, where a note is altered by the maker from \$8 to \$80, and from 9 to 90 days, by additions in spaces left without negligence by an accommodation indorser on signing the note, he will be discharged even at suit of a bona fide holder.²⁸⁷ So, where a note was delivered with an agreement that the place of payment should be left blank, and it was afterwards filled by the holder, the maker was discharged from all liability, even to a bona fide purchaser.²⁸⁸ And where one signs his name on a blank paper for the purpose of having his signature identified, and a note is afterwards printed over it, it will be a forgery and create no liability by estoppel.²⁸⁹ But where the payee indorses a check in blank, and delivers it to a clerk to make a deposit, and the clerk fills in the indorsement and transfers the check and misappropriates the proceeds, the purchaser will be protected.²⁹⁰ If a blank left for a particular purpose is fraudulently filled up in a different manner, it will be a forgery;²⁹¹ although it was given to a clerk for a special purpose, and appropriated by him to his own use, without authority, in payment of salary actually due him.²⁹² So, where a note is indorsed in blank in England to a French indorsee, and is filled up by him specially with date, consideration, etc., to make it conform to the

²⁸⁴ See §§ 76, 181, et seq., *supra*.

²⁸⁵ *Bruce v. Westcott*, 3 Barb. (N. Y.) 374; or to add "or bearer," or a place of payment, *Simmons v. Atkinson*, 69 Miss. 862, 12 South. 263.

²⁸⁶ The alteration being made by a clerk who broke open the letter given him to mail. *Belknap v. Bank*, 100 Mass. 376.

²⁸⁷ *Leas v. Walls*, 101 Pa. St. 57; *Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. 892; *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378. And see §§ 182, 187, *supra*.

²⁸⁸ *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. 64.

²⁸⁹ *Caulkins v. Whisler*, 29 Iowa, 495. But see *McDonald v. Bank*, 27 Iowa, 319.

²⁹⁰ *People v. Bank*, 75 N. Y. 547.

²⁹¹ *State v. Kroeger*, 47 Mo. 552.

²⁹² *Reg. v. Wilson*, 2 Car. & K. 527; *Flower v. Shaw*, Id. 703.

laws of France, it will be rendered void.²⁹³ In like manner, a blank left for the payee's name gives no authority to change the date;²⁹⁴ nor a blank for time and place of payment,²⁹⁵ or for the amount,²⁹⁶ to add an interest clause. If the date is left blank, it authorizes the insertion of a true date, but not a false one, as between the original parties.²⁹⁷

§ 1769. — If a bill is accepted with the payee's name blank, a bona fide holder may fill the blank with his own name.²⁹⁸ So, authority to add another surety will be implied by a blank left for it.²⁹⁹ So, the drawer's name may be added to a bill accepted with a blank for the drawer, even after the acceptor's death.³⁰⁰ So, authority is implied to fill a blank left for the time of payment,³⁰¹ or to add a place of payment in a blank after the word "at."³⁰² And, although the word is part of the printed form, such insertion by the maker will not discharge an accommodation indorser who had already signed.³⁰³ But where the name of a bank is inserted after the word "at," making the note negotiable by statute, it has been held to discharge other parties.³⁰⁴ If a blank is left for the rate of interest, it

²⁹³ *Hirschfeld v. Smith*, L. R. 1 C. P. 340. As to filling blank indorsements in general, see §§ 188, 708, *supra*.

²⁹⁴ *Bland v. O'Hagan*, 64 N. C. 471.

²⁹⁵ *McGrath v. Clark*, 56 N. Y. 34.

²⁹⁶ *Franklin Life Ins. Co. v. Courtney*, 60 Ind. 134.

²⁹⁷ *Overton v. Matthews*, 35 Ark. 146.

²⁹⁸ *Byles*, Bills, 327; *Chit. Bills*, 212; *Attwood v. Griffin*, Ryan & M. 425; *Thompson v. Rathbun*, 18 Or. 202, 22 Pac. 837. And see § 185, *supra*.

²⁹⁹ *Bank of Commonwealth v. McChord*, 4 Dana (Ky.) 191.

³⁰⁰ *Carter v. White*, 25 Ch. Div. 666.

³⁰¹ *Wilson v. Henderson*, 9 Smedes & M. (Miss.) 375. But not to add "on demand" to the words "—— after date," *Farmers' Nat. Bank v. Thomas*, 79 Hun, 505, 29 N. Y. Supp. 837; although he might fill in the number "in —— months"; *Lowden v. Bank*, 38 Kan. 533, 16 Pac. 748. And see § 186, *supra*.

³⁰² *Cason v. Bank*, 97 Ky. 487, 31 S. W. 40; although not originally so intended, *Kitchen v. Place*, 41 Barb. (N. Y.) 465; *Redlich v. Doll*, 54 N. Y. 237. Especially where a space was negligently left blank after the printed words "payable at the bank of ——," *Winter v. Pool*, 104 Ala. 580, 16 South. 543; or where the consent of one maker was obtained, and the action was brought by a bona fide holder, *Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362. But see *contra*, *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43. And see § 186, *supra*.

³⁰³ *Wessell v. Glenn*, 108 Pa. St. 105.

³⁰⁴ *Cronkhite v. Nebeker*, 81 Ind. 319.

may be filled without avoiding the note,³⁰⁵ especially where the blank has been negligently left.³⁰⁶ And even the insertion of a high rate of interest in such blank will not render it void in the hands of a bona fide holder.³⁰⁷ But where a rate of interest is inserted, which is the maximum rate allowed by law in case of special agreement, it has been held to discharge an accommodation indorser not consenting to it.³⁰⁸

Blank Left by Negligence.

§ 1770. Where a blank space is left by the negligence of the parties signing, and a subsequent holder is thereby enabled to raise the amount, the party guilty of the negligence is held, by earlier English cases at least, to be estopped from setting up the alteration in his discharge.³⁰⁹ And this rule has been followed in some American cases,³¹⁰ but seems to be now abandoned or materially qualified, both here and in England.³¹¹ Where a bank certifies a check which has

³⁰⁵ *Fisher v. Dennis*, 6 Cal. 577.

³⁰⁶ *Blakey v. Johnson*, 13 Bush (Ky.) 197. But see, contra, where it was inserted in spaces left in the printed blank against the express agreement of the parties. *Washington Sav. Bank v. Ecky*, 51 Mo. 272. So, although written in a note "with — per cent.," and in pursuance of the original agreement, and made by the plaintiff's agent on representation to him at the time of sale. *Woodworth v. Anderson*, 63 Iowa, 503, 19 N. W. 296. And see §§ 186, 1756, supra.

³⁰⁷ *Rainbolt v. Eddy*, 34 Iowa, 440. But, if the rate inserted exceeds the legal rate, only the latter can be recovered. *Patton v. Shanklin*, 14 B. Mon. (Ky.) 15.

³⁰⁸ *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274, reversing 16 N. Y. Wkly. Dig. 412.

³⁰⁹ *Byles, Bills*, 328; *Benj. Chalm. Dig. art. 237*; 2 *Daniel, Neg. Inst.* 416; 1 *Edw. Bills & N.* § 264; *Pagan v. Wylie*, 1 *Ross, Lead. Cas.* 194. So, where the negligence is that of the drawer's agent, *Young v. Grote*, 4 *Bing.* 253; or where the blank is left by the fraud of the clerk who drew the paper, and overlooked by the negligence of the drawer, *Halifax Union v. Wheelwright*, L. R. 10 *Exch.* 183.

³¹⁰ *Garrard v. Haddan*, 67 *Pa. St.* 82; *Brown v. Reed*, 79 *Pa. St.* 370; *Isnard v. Torres*, 10 *La. Ann.* 103; *Yocum v. Smith*, 63 *Ill.* 321. And see § 1782, *infra*.

³¹¹ See § 187, *supra*; *Greenfield Sav. Bank v. Stowell*, 123 *Mass.* 196, *Gray, C. J.*, saying in this case: "That the signer of a note complete upon its face, and not intrusted by him to any person for the purpose of being filled up or added to, but afterwards altered, without his authority or assent, by the in-

been so drawn as to make it easy to raise the amount without the alteration being perceived, it has been held, in like manner, to be estopped from setting up such alteration.³¹² In such cases, the fact of negligence is a question for the jury.³¹³ Thus, it has been held in England that an acceptor will be liable to a bona fide holder for accepting a bill with the amount left blank and only designated in the margin by figures, the figures having been altered, and the blank fraudulently filled with a greater amount than was agreed on.³¹⁴ And where a maker is negligent in signing the note, and it is fraudulently altered by raising the amount, he cannot hold his agent for the misconduct of a subagent, who drew the note with such blanks, and afterwards altered and misappropriated it.³¹⁵

Consent, by Whom Given.

§ 1771. The consent of a party will sometimes be implied from the consent or other action of an agent. Thus, where a bill is dated by mistake in a wrong year, and the mistake is corrected by the agent of the drawer and acceptor, although without their knowledge, it will not discharge the bill.³¹⁶ But an agent appointed to sell goods and take a note has no authority to alter the terms of the note taken, and such alteration by him will be regarded as the act of a stranger, and will not discharge the note as originally drawn.³¹⁷

section of additional words in blank spaces therein, should be held to have contracted with every subsequent innocent holder who may be thereby defrauded, and to be held liable to him in an action on the note in its altered form, is unsupported by any English decision of which we are aware, and appears to us to be inconsistent with the weight of American authority, and unfounded in principle." So, *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 1 N. W. 491; *Abbott v. Rose*, 62 Me. 194; *Exchange Nat. Bank of Spokane v. Bank of Little Rock*, 7 C. C. A. 111, 58 Fed. 140, 22 Lawy. Rep. Ann. 686, note; *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378. And see §§ 182, 1768, supra.

³¹² *Helwege v. Bank*, 28 La. Ann. 520.

³¹³ *Brown v. Reed*, 79 Pa. St. 370.

³¹⁴ *Garrard v. Lewis*, 10 Q. B. Div. 30.

³¹⁵ The note being so drawn, and afterwards altered by the subagent. *Whitmore v. Wilks*, 3 Car. & P. 364.

³¹⁶ *Byles, Bills*, 327; *Chit. Bills*, 212; *Brutt v. Picard*, *Ryan & M.* 37; or by the agent of the maker, *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501.

³¹⁷ *Bigelow v. Stilphens*, 35 Vt. 521.

Where a check is drawn and left by the drawer with his foreman to pay wages, he is not authorized to alter it, and if he makes a material alteration, and obtains the money from the bank, the drawer will not be liable to the bank for the amount paid.³¹⁸

If a note is altered by the direction of one maker without the consent of his co-maker, the latter will be discharged.³¹⁹ But if one obligor of a bond places it in the hands of his co-obligor, and the latter erases one of the signatures before delivering the bond, his authority as agent, and the consequent consent of his co-obligors, will be presumed.³²⁰ The consent of one will be binding upon the other, where the indorsement is altered by the maker, and the maker and indorser are partners.³²¹ But an accommodation maker is not bound by an alteration made by the payee before the note is discounted.³²² So, the drawer's consent to an alteration will not bind the acceptor.³²³ And an accommodation acceptor will be discharged by an alteration made by the drawer before discounting the bill.³²⁴

§ 1772. — The consent of a maker to the alteration of a note will not bind other parties.³²⁵ If it is made by the maker or principal debtor, without the surety's consent, it will discharge the latter.³²⁶

³¹⁸ *Crawford v. Bank*, 49 N. Y. Super. Ct. 68.

³¹⁹ *Perring v. Hone*, 2 Car. & P. 401, 4 Bing. 28; *Biery v. Haines*, 5 Whart. (Pa.) 563; *Draper v. Wood*, 112 Mass. 315; *Fay v. Smith*, 1 Allen (Mass.) 477; *Broughton v. Fuller*, 9 Vt. 373; *Horn v. Bank*, 32 Kan. 518, 4 Pac. 1022; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331; *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113. Although made in the presence of one maker, who said he had authority from the other. *McVey v. Ely*, 5 Lea (Tenn.) 438. The consent of one partner will, however, bind his copartner as to partnership paper. *Mace v. Heath*, 30 Neb. 620, 46 N. W. 918.

³²⁰ *Wilmington & W. R. Co. v. Kitchin*, 91 N. C. 38.

³²¹ *Pahlman v. Taylor*, 75 Ill. 629. So, where the makers are partners, and one consents, although the note is executed in their individual names, but the consideration was received by the firm. *Taylor v. Taylor*, 12 Lea (Tenn.) 714.

³²² *Fraker v. Cullum*, 21 Kan. 555.

³²³ *Chit. Bills*, 216; *Cardwell v. Martin*, 9 East, 190; or a bank certifying a check drawn on it, *Abrams v. Bank*, 31 La. Ann. 61.

³²⁴ *Calvert v. Roberts*, 3 Camp. 343. Although it would be otherwise if the drawer had received a general authority from the acceptor. *Johnson v. Gibb*, 2 Chlt. 123.

³²⁵ *Craighead v. McLoney*, 99 Pa. 211.

³²⁶ *Wood v. Steele*, 6 Wall. 80; *Franklin Life Ins. Co. v. Courtney*, 60 Ind.

And the fact that the surety allowed the principal to take the note for the purpose of having it discounted is no authority for an alteration.³²⁷ But the surety's estate will be bound by the consent of his administrator, although such administrator is also the principal maker.³²⁸ If the alteration is made by consent of the drawer and acceptor after indorsement, the indorser will be discharged.³²⁹ So, an indorser is not bound by consent given by the maker.³³⁰ And an alteration made by the maker will discharge an accommodation indorser,³³¹ especially where it is fraudulently made.³³² And no authority to alter the amount of a note after its execution by an accommodation indorser will be implied from the previous indorsement

134; *Schnewind v. Hacket*, 54 Ind. 248; *Britton v. Dierker*, 46 Mo. 591; *Marsh v. Griffin*, 42 Iowa, 403; *Neff v. Horner*, 63 Pa. St. 327; *Brown v. Reed*, 79 Pa. St. 370; *Brown v. Straw*, 6 Neb. 536; *Goodman v. Eastman*, 4 N. H. 455; *Haines v. Dennett*, 11 N. H. 180; *Glover v. Robbins*, 49 Ala. 219; *Coburn v. Webb*, 56 Ind. 96; *Benedict v. Miner*, 58 Ill. 19; *Hanson v. Crawley*, 41 Ga. 303; *Crockett v. Thomason*, 5 Sneed (Tenn.) 342; *Hill v. O'Neill*, 101 Ga. 832, 28 S. E. 996; *Thompson v. Massie*, 41 Ohio St. 307; *Sanders v. Bagwell*, 32 S. C. 238, 10 S. E. 946; *Id.*, 37 S. C. 145, 15 S. E. 714, and 16 S. E. 770. And the holder cannot afterwards strike out the alteration and revive the surety's liability. *Fulmer v. Seltz*, 68 Pa. St. 237. But an immaterial alteration by the principal will not discharge the surety. *Keene's Adm'r v. Miller* (Ky.) 45 S. W. 1041.

³²⁷ *Agawam Bank v. Sears*, 4 Gray (Mass.) 95; *Blakey v. Johnson*, 13 Bush (Ky.) 197. But see, contra, where the alteration was merely the signature of an additional surety. *Ward v. Hackett*, 30 Minn. 150, 14 N. W. 578. And see *Bingham v. Reddy*, 5 Ben. 266, Fed. Cas. No. 1,414.

³²⁸ *Voiles v. Green*, 43 Ind. 374.

³²⁹ *Chit. Bills*, 215; *Outhwaite v. Luntley*, 4 Camp. 179.

³³⁰ *Stephens v. Graham*, 7 Serg. & R. (Pa.) 505.

³³¹ *Aldrich v. Smith*, 37 Mich. 468; *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274, reversing 16 N. Y. Wkly. Dig. 412; *Stoddard v. Penniman*, 108 Mass. 366; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392; *Batchelder v. White*, 80 Va. 103; *McMillan v. Hefferlin*, 18 Mont. 385, 45 Pac. 548; *Farmers' & Merchants' Nat. Bank v. Novich*, 80 Tex. 381, 34 S. W. 914. Although altered before the maker signed or delivered it, *Halcrow v. Kelly*, 28 U. C. C. P. 551; *Woodworth v. Bank*, 19 Johns. (N. Y.) 391, reversing 18 Johns. (N. Y.) 315; or procured it to be discounted, *Sturges v. Williams*, 9 Ohio St. 443; *Waterman v. Vose*, 43 Me. 504.

³³² *Trigg v. Taylor*, 27 Mo. 245.

by him of a series of renewal notes.³³³ But, if an accommodation indorser leaves a blank which is filled by the maker or acceptor, he will not be discharged by the alteration.³³⁴

Alteration under Stamp Act.

§ 1773. Where a bill or note is complete, an alteration is considered to be a fresh drawing under the British stamp act; and it is therefore void without a fresh stamp, although not previously negotiated.³³⁵ This has been held also in the case of an additional signature, unless originally intended by the parties.³³⁶ So, a new stamp is required by an alteration in the date of a bill,³³⁷ or in the time of payment,³³⁸ or in making a particular statement of the consideration.³³⁹ On the contrary, an alteration of the terms of the bill in the acceptance has been held not to require a new stamp.³⁴⁰ So, the filling of a blank left for the payee's name;³⁴¹ or the insertion of the words "or order," which had been omitted by mistake;³⁴² or an alteration of the date at the drawer's request before acceptance;³⁴³ or

³³³ *Ætna Nat. Bank v. Winchester*, 43 Conn. 391.

³³⁴ *Kitchen v. Place*, 41 Barb. (N. Y.) 465; *Hepler v. Bank*, 97 Pa. St. 420; *Rogers v. Poston*, 1 Mete. (Ky.) 643.

³³⁵ *Bowman v. Nichol*, 5 Term R. 537; *Bathe v. Taylor*, 15 East, 412. E. g. after indorsement. *Johnson v. Duke of Marlborough*, 2 Starkie, 313.

³³⁶ *Clark v. Blackstock*, Holt, 474; *Ex parte White*, 2 Deac. & C. 334.

³³⁷ *Byles, Bills*, 326; *Outhwaite v. Luntley*, 4 Camp. 179; *Walton v. Hastings*, Id. 223; *Cordwell v. Martin*, 1 Camp. 79; *Bathe v. Taylor*, 15 East, 412. Although the bill had not been negotiated, *Cordwell v. Martin*, 9 East, 190.

³³⁸ *Willson v. Justice*, Peake, Add. Cas. 96. And if changed before negotiation by consent of the acceptor, and before negotiation, from 21 to 51, and restored to 21 days after date, and date advanced 12 days, each change requires a new stamp. *Bowman v. Nichol*, 5 Term R. 537.

³³⁹ *Hamelln v. Bruck*, 9 Q. B. 306; *Knill v. Williams*, 10 East, 431. But see, contra, if made before the last maker signs, *Wright v. Inshaw*, 1 Dowl. (N. S.) 802.

³⁴⁰ *Chit. Bills*, 216; *Stevens v. Lloyd*, Moody & M. 292.

³⁴¹ *Attwood v. Griffin*, Ryan & M. 425, 2 Car. & P. 368.

³⁴² *Byrom v. Thompson*, 11 Adol. & E. 31; *Kershaw v. Cox*, 3 Esp. 246.

³⁴³ *Chit. Bills*, 212; *Peacock v. Murrell*, 2 Starkie, 558; *Upstone v. Marchant*, 2 Barn. & C. 10; *Brutt v. Picard*, Ryan & M. 37; *Downes v. Richardson*, 5 Barn. & Ald. 674.

a change in the time of payment by which it is accelerated³⁴⁴ or postponed;³⁴⁵ or a memorandum as to the place of payment.³⁴⁶

Ratification and Waiver.

§ 1774. The consent of a party to an alteration may be given long after,³⁴⁷ and it may be implied from a subsequent promise amounting to a ratification;³⁴⁸ and such subsequent consent on the part of a surety will not require a fresh consideration.* If an accommodation indorser takes up a draft after its alteration by the drawer, and re-issues it for money lent him, he will be liable as though he had originally consented.³⁴⁹ And silence on the indorser's part on receiving notice of protest, payment of other similar notes, and suffering the suit on the note to go by default, until after the maker had absconded, are all admissible as evidence of ratification.³⁵⁰ So, too, if a party, with knowledge of the alteration, afterwards agrees to extend the time for payment,³⁵¹ or makes a payment on account of principal³⁵² or interest.³⁵³ But a payment of interest, to amount to a fresh acknowledgment of the debt, must be sufficiently exact to enable the jury to ascertain the precise amount of the debt admitted.³⁵⁴ If the alteration increases the rate of interest, and the surety pays such increased rate after learning of the alteration, it will be a consent on

³⁴⁴ *Tarleton v. Shingler*, 7 C. B. 812.

³⁴⁵ *Kennerly v. Nash*, 1 Starkie, 452; *Leykariff v. Ashford*, 12 Moore, 281.

³⁴⁶ *Chit. Bills*, 214; *Jacob v. Hart*, 6 Maule & S. 142; *Stevens v. Lloyd, Moody & M.* 292.

³⁴⁷ *Willard v. Clarke*, 7 Metc. (Mass.) 435.

³⁴⁸ *Powers v. Nash*, 37 Me. 322; *National State Bank of Troy v. Rising*, 4 Hun (N. Y.) 793; *Humphreys v. Guillow*, 13 N. H. 385; *Stewart v. Bank*, 40 Mich. 348. And he cannot rescind the note and retain the consideration. *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. 652. And, if he afterwards knowingly receives the goods purchased with the note, it will be a waiver even of the defense of forgery. *Union Bank v. Middlebrook*, 33 Conn. 95.

* *Pelton v. Prescott*, 13 Iowa, 567.

³⁴⁹ *Ward v. Allen*, 2 Metc. (Mass.) 53.

³⁵⁰ *Weed v. Carpenter*, 10 Wend. (N. Y.) 403.

³⁵¹ *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331.

³⁵² *Evans v. Foreman*, 60 Mo. 449.

³⁵³ *Cariss v. Tattersall*, 2 Man. & G. 800.

³⁵⁴ *Chit. Bills*, 220; *Green v. Davies*, 4 Barn. & C. 235, 6 Dowl. & R. 306.

his part.³⁵⁵ And even payment, made on a note which is known to be forged, will be a ratification of the forgery, or an admission of the signature as genuine.³⁵⁶

Waiver by Acknowledgment—Promise.

§ 1775. An acknowledgment of responsibility for a forged acceptance is a waiver, if made with knowledge of the forgery³⁵⁷ and with the intention of being bound by it.³⁵⁸ And the ratification may be a verbal one.³⁵⁹ And it may be shown by the giving of a renewal with knowledge of the alteration;³⁶⁰ or requesting an extension;³⁶¹ or by the taking of an indemnity bond;³⁶² or by a promise of payment with full knowledge of an alteration or forgery.³⁶³ So, where an agent intrusted with a note altered it to a bill of exchange, and

³⁵⁵ *Prouty v. Wilson*, 123 Mass. 297.

³⁵⁶ *Crout v. De Wolf*, 1 R. I. 393.

³⁵⁷ *Ex parte Edwards*, 2 Mont. D. & D. 241; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Forsythe v. Bonta*, 5 Bush (Ky.) 547. So, the maker of a note, telling the purchaser that it was all right, *Harrison v. Luce*, 64 Ark. 583, 43 S. W. 970; or acknowledging a sealed note after alteration, *Wester v. Bailey*, 118 N. C. 193, 24 S. E. 9; or acquiescing in the alteration, *Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362. But mere silence on receiving notice of protest is not enough. *Greenfield Bank v. Crafts*, *supra*. Nor failure of a bank to recognize a bank note as forged on its first presentation. *Salem Bank v. Gloucester Bank*, 17 Mass. 1. Although it is otherwise, if the bank is guilty of laches. *United States Bank v. Bank of Georgia*, 10 Wheat. 333. Although it has been said that a forgery cannot be "ratified." *Brook v. Hook*, L. R. 6 Exch. 89. And see *Williams v. Bayley*, L. R. 1 H. L. 200; *Shisler v. Vandike*, 92 Pa. St. 447; *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467.

³⁵⁸ *Wellington v. Jackson*, 121 Mass. 157.

³⁵⁹ *Howard v. Duncan*, 3 Lans. (N. Y.) 174.

³⁶⁰ *Bradford Nat. Bank v. Taylor*, 75 Hun, 297, 27 N. Y. Supp. 96. But not the offer of a conditional renewal, which was refused. *McDaniel v. Whittsett*, 96 Tenn. 10, 33 S. W. 567.

³⁶¹ *Bell v. Mahin*, 69 Iowa, 409, 29 N. W. 331.

³⁶² Although admissions of liability after maturity are not sufficient. *Woodruff v. Munroe*, 33 Md. 146. Nor a mortgage by the principal to the surety which was not delivered nor known to the surety, but recited the alteration in the note. *Benedict v. Miner*, 58 Ill. 19.

³⁶³ *Goodspeed v. Cutler*, 75 Ill. 534; *Pritchard v. Smith*, 77 Ga. 463. But it must be made with full knowledge, *Gleason v. Henry*, 71 Ill. 109; *Westloh v. Brown*, 43 U. C. Q. B. 402; and upon new consideration, *Warren v. Fant's*

the principal afterwards examined it and said the agent was primarily liable, but made no other objection, it was held to be a ratification.³⁶⁴ And a new note, given in compromise of one alleged to be forged, is a waiver, and will bar the maker from setting up the original forgery.³⁶⁵ And a maker is liable who signs after the forged signature of a co-maker, although such forgery was not known to him or the holder.³⁶⁶

In like manner, where the teller of a bank declares a certified draft to be good, after notice of its miscarriage and stoppage of payment, and in disregard of the bank custom to look at the drawer's account before certifying, it will be a waiver of a previous alteration raising the amount of the draft.³⁶⁷ So, a telegram by the drawee, directing the drawer to "make drafts payable through clearing house," renders him liable, if the drafts are changed to that effect after being drawn, and are discounted on the faith of the telegram.³⁶⁸

What is not a Waiver.

§ 1776. An alteration is not waived or consented to by the giving of a note without knowledge of the alteration;³⁶⁹ nor by trying to arrange with the holder for payment in future;³⁷⁰ nor by a letter complaining of the alteration, and stating that he had been prepared to pay, and the plaintiff might have the money by calling at the house;³⁷¹ nor by writing a waiver of protest over a forged indorsement with no intention of admitting the indorsement;³⁷² nor by rewriting penciled

Trustee, 79 Ky. 1; *Workman v. Wright*, 33 Ohio St. 405; and must be in writing, *Smith v. Tramel*, 68 Iowa, 488, 27 N. W. 471.

³⁶⁴ *Ward v. Williams*, 28 Ill. 447.

³⁶⁵ *Grant v. Chambers*, 30 N. J. Law, 323.

³⁶⁶ *Hunter v. Fitzmaurice*, 102 Ind. 449, 2 N. E. 127. Although the prior signers were principals, and the last a mere surety. *Chase v. Hathorn*, 61 Me. 506, following *York Co. Mut. Fire Ins. Co. v. Brooks*, 51 Me. 506.

³⁶⁷ *Clews v. Bank*, 105 N. Y. 398, 11 N. E. 814. So, an acceptance for the drawer's honor, relied on by a purchaser, estops the acceptor from setting up the forgery of the drawer's name. *Phillips v. Im Thurn*, L. R. 1 C. P. 463.

³⁶⁸ *Louisiana Nat. Bank of New Orleans v. Schuchardt*, 15 Hun (N. Y.) 405.

³⁶⁹ *Byles, Bills*, 328; *Bell v. Gardiner*, 4 Man. & G. 11; means of knowledge not being equivalent to knowledge.

³⁷⁰ *McMillan v. Hefferlin*, 18 Mont. 385, 45 Pac. 548.

³⁷¹ *Chit. Bills*, 210; *Calvert v. Baker*, 4 Mees. & W. 417.

³⁷² *Robinson v. Barnett*, 18 Fla. 602. But see, contra, as to an alteration and

words in ink without noticing the alteration;³⁷³ nor by saying to the purchaser, when he bought the paper, but without knowledge of an erasure in it, that he had no defense;³⁷⁴ nor by making a part payment without knowledge that the paper had been altered.³⁷⁵ And, even if the maker pays at maturity without knowledge of the forgery of the indorsement, he may recover from the party receiving the payment.³⁷⁶ And a waiver by part payment, made by one of two accommodation makers, will not bind his co-maker, or support an action for contribution against him.³⁷⁷

Admissible against Bona Fide Holder.

§ 1777. The alteration or forgery of a bill is a good defense against a bona fide holder for value before maturity, and renders the bill void, in whosoever hands it may be found.³⁷⁸ And this is true, although subsequent waiver of protest, *Montgomery v. Crossthwait*, 90 Ala. 553, 8 South. 498.

³⁷³ *Boalt v. Brown*, 13 Ohio St. 364.

³⁷⁴ *Koons v. Davis*, 84 Ind. 387.

³⁷⁵ *Benedict v. Miner*, 58 Ill. 19. And such payment, made without careful examination, may be recovered back. *Fraker v. Little*, 24 Kan. 598.

³⁷⁶ *Carpenter v. Bank*, 123 Mass. 66.

³⁷⁷ *Davis v. Bauer*, 41 Ohio St. 257.

³⁷⁸ *Byles*, Bills, 328; *Chit. Bills*, 209; 2 *Daniel*, Neg. Inst. 386; 2 *Pars. Notes & B.* 544; *Burchfield v. Moore*, 3 El. & Bl. 683; *Vance v. Lowther*, 1 Exch. Div. 176; *Master v. Miller*, 4 Term R. 320, 2 H. B. 110; *Outhwaite v. Luntley*, 4 Camp. 179; *Belknap v. Bank*, 100 Mass. 376; *Mahaiwe Bank v. Douglass*, 31 Conn. 170; *Bradley v. Mann*, 37 Mich. 1; *Wait v. Pomeroy*, 20 Mich. 425; *Hunter v. Parsons*, 22 Mich. 96; *Holmes v. Trumper*, Id. 427; *Burwell v. Orr*, 84 Ill. 465; *Auten v. Gruner*, 90 Ill. 300; *Collier v. Waugh*, 64 Ind. 456; *Hert v. Oehler*, 80 Ind. 83; *Cronkhite v. Nebeker*, 81 Ind. 319; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528; *Laub v. Palne*, 46 Iowa, 550; *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. 64; *Bruce v. Westcott*, 3 Barb. (N. Y.) 374; *Sudler v. Collins*, 2 *Houst. (Del.)* 538; *Washington Sav. Bank v. Ecky*, 51 Mo. 272; *Trigg v. Taylor*, 27 Mo. 245; *United States Bank v. Russell*, 3 *Yeates (Pa.)* 391; *Exchange Nat. Bank of Spokane v. Bank of Little Rock*, 7 C. C. A. 111, 58 Fed. 140, and 22 *Lawy. Rep. Ann.* 686, note; *Hill v. O'Neill*, 101 Ga. 832, 28 S. E. 996; *Derr v. Keaough*, 96 Iowa, 397, 65 N. W. 339; *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378; *Erickson v. Bank*, 44 Neb. 622, 62 N. W. 1078; *Mt. Morris Bank v. Lawson*, 10 Misc. Rep. 359, 31 N. Y. Supp. 18; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. St. 564, 32 Atl. 730; *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382; *Farmers' & Merchants' Nat. Bank v. Novich*, 89 Tex. 381, 34 S.

though the alteration could not have been detected.³⁷⁹ So, the drawer of a bill, which is afterwards altered, is not liable to an accommodation indorser, who takes it up without notice.³⁸⁰ In like manner, a bona fide holder, who claims title under a forged indorsement, cannot hold the bill against the rightful owner or recover upon it against other parties.³⁸¹ But a surety cannot set up as against a bona fide holder that he has been induced in good faith to sign the note by the forged signature of a pretended co-surety.³⁸² If a bank note is forged, the bank will not be liable to a bona fide holder.³⁸³ So, if school bonds are fraudulently issued with forged signatures, the school district will not be liable.³⁸⁴ And if one signs a contract in such manner as to make it possible to alter it to a negotiable note by cutting off a portion of it, and such alteration is made, he will not be liable even to a bona fide holder, where he has been guilty of no negligence.³⁸⁵ So, where one authorizes another to indorse in his name for certain purposes, and the latter fraudulently indorses the name of the former for other purposes, it will be a good defense even against a bona fide holder, who knew nothing of the authority or agreement.³⁸⁶

But the stamping of a note without authority after its execution will not affect its validity in the hands of a bona fide holder.³⁸⁷ So, even an alteration in the number of a negotiable bond, which the

W. 914; *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523; *Overton v. Matthews*, 35 Ark. 146; *Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. 892. As to the effect of blanks left, see § 1765, *supra*.

³⁷⁹ *Wade v. Withington*, 1 Allen (Mass.) 561.

³⁸⁰ *Fontaine v. Gunter*, 31 Ala. 258.

³⁸¹ *Esdalle v. Lanauze*, 1 Younge & C. Exch. 394; *Johnson v. Windle*, 3 Bing. N. C. 225, 3 Scott, 608; *Colson v. Arnot*, 57 N. Y. 253; *Palm v. Watt*, 7 Hun (N. Y.) 317; *Buckley v. Bank*, 35 N. J. Law, 400; *Woodruff v. Munroe*, 33 Md. 146. Unless the payee is fictitious. *Kohn v. Watkins*, 26 Kan. 601.

³⁸² *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555; *Second Nat. Bank v. Hewitt*, 59 N. J. Law, 57, 34 Atl. 988.

³⁸³ *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

³⁸⁴ *State v. School Dist. No. 9*, 10 Neb. 544, 7 N. W. 315.

³⁸⁵ *Scofield v. Ford*, 56 Iowa, 370, 9 N. W. 309.

³⁸⁶ *Hotchkiss v. English*, 4 Hun (N. Y.) 369.

³⁸⁷ *Blackwell v. Denie*, 23 Iowa, 63. Although contrary to agreement. *Anderson v. Starkweather*, 28 Iowa, 409.

law did not require to be numbered, although made with a fraudulent purpose.³⁸⁸

Effect of Restoration.

§ 1778. But if a bill is restored to its original form after being altered, and comes into the hands of a bona fide holder, he may recover on it,³⁸⁹ even though there may be traces of the alteration.³⁹⁰ On the other hand, if a note is altered by the maker raising the amount after an accommodation indorsement and without the indorser's knowledge, and the alteration is afterwards discovered by the holder and the original amount restored with the indorser's knowledge, the indorser will not be liable.³⁹¹

Estoppel by Indorsement.

§ 1779. It has been held that one who indorses a bill which has been altered in any way is liable to subsequent parties, although the cases are not uniform in this view.³⁹² An indorsement warrants the genuineness of prior signatures, and the indorser is estopped from setting up that such signature is a forgery.³⁹³ And this is true of the blank indorsement of a check for the purpose of deposit, negligently left upon it when the check was repudiated and returned, and afterwards transferred with it to a bona fide holder.³⁹⁴ So, of a second

³⁸⁸ *Com. v. Emigrant Industrial Sav. Bank*, 98 Mass. 12; *Suffell v. Bank*, 7 Q. B. Div. 270.

³⁸⁹ *Benj. Chalm. Dig. art. 248*; *Kountz v. Kennedy*, 63 Pa. St. 187. Especially where the alteration was an immaterial addition. *Whitmore v. Nickerson*, 125 Mass. 496.

³⁹⁰ *Shepard v. Whetstone*, 51 Iowa, 457, 1 N. W. 753.

³⁹¹ *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110.

³⁹² *Archer v. Ward*, 9 Grat. (Va.) 622. And see § 752 et seq., *supra*.

³⁹³ *Cabot Bank v. Morton*, 4 Gray (Mass.) 156; *Burgess v. Bank*, 4 Bush (Ky.) 600; or that the paper has been altered, *Rapp v. Bank*, 138 Pa. St. 426, 20 Atl. 508; *Alleman v. Wheeler*, 101 Ind. 141. Although he expressly refuses to guaranty the maker's solvency. *Herrick v. Whitney*, 15 Johns. (N. Y.) 240. And although his indorsement was obtained by a fraudulent misrepresentation as to the maker's signature. *Mosher v. Carpenter*, 13 Hun (N. Y.) 602. So, one who guaranties a note after inspecting it is liable to a bona fide holder, although it is afterwards discovered to be a forgery. *Veazie v. Willis*, 6 Gray (Mass.) 90. And see § 752, *supra*.

³⁹⁴ *Turnbull v. Bowyer*, 40 N. Y. 456, affirming 2 Rob. (N. Y.) 411.

indorsement, after a prior forged indorsement, although the note was discounted directly for the maker.³⁹⁵ And one who transfers a note without indorsement, by mere delivery, warrants the genuineness of the prior signatures.³⁹⁶ And the purchaser, after discovery of the forgery, may recover the consideration paid from the party transferring to him.³⁹⁷ And such payment, made to a broker, may be recovered, although he had paid the money over to his principal, whom he had not disclosed.³⁹⁸

Estoppel by Acceptance.

§ 1780. The acceptance of a bill warrants the genuineness of the drawer's signature.³⁹⁹ Thus, a bank certifying a forged check is liable on it to a bona fide holder.⁴⁰⁰ But it is not liable, if the check has been altered in a material part.⁴⁰¹ If the drawee, however, pays a bill by mistake on the faith of a forged bill of lading attached to it, he cannot recover such payment.⁴⁰²

But the acceptor of a bill may set up the forgery of an indorsement.⁴⁰³ And, if he pays the bill to a stranger upon an unauthor-

³⁹⁵ *State Bank v. Fearing*, 16 Pick. (Mass.) 533.

³⁹⁶ 2 Daniel, Neg. Inst. 368; 2 Pars. Notes & B. 589. And see § 753, *supra*.

³⁹⁷ *Byles, Bills*, 339; *Jones v. Ryde*, 5 Taunt. 488, 1 Marsh. C. P. 157; *Bruce v. Bruce*, 5 Taunt. 495, note, 1 Marsh. C. P. 165; *Gurney v. Womersley*, 4 El. & Bl. 133; *Brewster v. Burnett*, 125 Mass. 68; *Morrison v. Currie*, 4 Duer (N. Y.) 79; *Smith v. McNair*, 19 Kan. 330; *Hargrave v. Dusenberry*, 9 N. C. 326.

³⁹⁸ *Merriam v. Wolcott*, 3 Allen (Mass.) 258.

³⁹⁹ *Benj. Chalm. Dig.* art. 212; 2 Daniel, Neg. Inst. 369; 1 Edw. Bills & N. § 272; 2 Pars. Notes & B. 590; *Story, Bills*, § 262; *Price v. Neal*, 1 W. Bl. 390, 3 Burrows, 1354; *Jenys v. Fowler*, *Strange*, 946; *Goetz v. Bank*, 119 U. S. 551, 7 Sup. Ct. 318; *Howard v. Bank*, 28 La. Ann. 728. Although the drawer's name is a fictitious one. *Cooper v. Meyer*, 10 Barn. & C. 468. And see § 629, *supra*.

⁴⁰⁰ *Hagen v. Bank*, 6 Lans. (N. Y.) 490; *Clews v. Association*, 89 N. Y. 418.

⁴⁰¹ *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; *National Bank of Commerce in New York v. National Mechanics' Banking Ass'n of New York*, 55 N. Y. 211; *White v. Bank*, 64 N. Y. 316; *Clews v. Association*, *supra*. But see *Louisiana Nat. Bank of New Orleans v. Citizens' Bank of Louisiana*, 28 La. Ann. 189.

⁴⁰² *Hoffman v. Bank*, 12 Wall. 181.

⁴⁰³ 2 Daniel, Neg. Inst. 373; 2 Pars. Notes & B. 590; *Story, Bills*, § 262. And see §§ 632, 666, *supra*. But it is otherwise if the drawer issued the bill

ized indorsement, it will not amount to an acceptance which will render him liable as acceptor to the real owner.⁴⁰⁴

Estoppel by Conduct—Admissions.

§ 1781. If the maker sells a note with an indorsement in the payee's name, he will be liable, although the payee's signature is forged.⁴⁰⁵ So, if a bill is indorsed and delivered to one who falsely personates the rightful owner, and who afterwards indorses and transfers the note in the name of such owner to a bona fide holder, the original indorser will be estopped from denying the validity of the transfer or attacking the indorsement as a forgery.⁴⁰⁶ And one who erases his own indorsement cannot afterwards prove that it was a forgery.⁴⁰⁷

Where a party admits his signature, he will be estopped from setting up that it is a forgery.⁴⁰⁸ But this is only true where the instrument was produced or clearly identified at the time, and where the admission has been acted on in such way as to constitute an equitable estoppel.⁴⁰⁹ Where a check, purporting to be certified by the teller of a bank, is presented to him, and pronounced by him to

with the forged indorsement, and would therefore be liable to the acceptor, who paid it. *Hortsmann v. Henshaw*, 11 How. 177.

⁴⁰⁴ *First Nat. Bank of Washington v. Whitman*, 94 U. S. 343.

⁴⁰⁵ *Beal v. Roberts*, 113 Mass. 525; *Coggill v. Bank*, 1 N. Y. 113; *Meacher v. Fort*, 3 Hill (S. C.) 227.

⁴⁰⁶ *Forbes v. Espy*, 21 Ohio St. 474. So, where the government delivers its check to A., believing him to be the payee, and A. introduces B. to the bank as the payee, and the check is paid to B. *United States v. Bank*, 45 Fed. 163.

⁴⁰⁷ *Broadwell v. Stiles*, 8 N. J. Law, 58; or was barred by the statute of limitations, *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130. And he cannot object to parol evidence of the contents of an indictment for forgery. *U. S. v. Britton*, 2 Mason, 464, Fed. Cas. No. 14,650.

⁴⁰⁸ *Byles, Bills*, 203; 2 *Daniel, Neg. Inst.* 361, if deliberate; 1 *Edw. Bills & N.* § 275; *Leach v. Buchanan*, 4 Esp. 226; *Casco Bank v. Keene*, 53 Me. 103; *Hefner v. Dawson*, 63 Ill. 403; *Hefner v. Vandolah*, 62 Ill. 483, 57 Ill. 520; *Rudd v. Matthews*, 79 Ky. 479. And see *Cooper v. Le Blanc*, 2 Strange, 1051. And in such case the maker is liable for the amount of the note, and not merely for the damage caused by the misrepresentation. *Casco Bank v. Keene*, *supra*.

⁴⁰⁹ *Sheller v. McKenney*, 17 Ill. App. 185. If the plaintiff was not influenced (2512)

be all right, the bank will be bound by this admission, although the certification was forged.⁴¹⁰ And the defendant is estopped from setting up an alteration or forgery, where he has himself induced the purchaser to take the bill as authentic,⁴¹¹ or where he has consented to the release of a prior party expressly on that ground.⁴¹² And, where a father's name is forged to a joint note by him and his son, evidence that he had previously paid such notes with knowledge of their true character will be admissible, as tending to show an authority on the part of the son to sign for the father.⁴¹³ But the mere payment of a previous similar forgery will not estop the party making the payment from defending against a later forgery.⁴¹⁴

Estoppel by Laches.

§ 1782. Where part of a note is written in pencil, and the penciling is erased, the party writing it is estopped by his negligence from setting up such alteration against a bona fide holder.⁴¹⁵ So, if he negligently executes the paper, with a condition so written that it may be afterwards removed without detection, and this is done.⁴¹⁶ So, if he negligently tears a bill into two pieces and throws it away, and the pieces are picked up in his presence, and afterwards put together and transferred as an uncanceled bill to a bona fide holder.⁴¹⁷ So, if a bank receives on deposit from a stranger a forged check on

by the representation, the defendant will not be estopped. *Starr v. Yourtee*, 17 Md. 341.

⁴¹⁰ *Continental Nat. Bank v. National Bank of Commonwealth*, 50 N. Y. 575.

⁴¹¹ *Phillips v. Im Thurn*, L. R. 1 C. P. 463.

⁴¹² *Conable v. Smith*, 61 Hun, 185, 15 N. Y. Supp. 924; although the party released was insolvent.

⁴¹³ *Hammond v. Varian*, 54 N. Y. 398; *Crout v. De Wolf*, 1 R. I. 393.

⁴¹⁴ *Morris v. Bethell*, L. R. 5 C. P. 47; *People v. Bank of North America*, 75 N. Y. 547; *Whiteford v. Munroe*, 17 Md. 135. Especially if it was paid before the forgery was discovered. *Palm v. Watt*, 7 Hun (N. Y.) 317.

⁴¹⁵ *Harvey v. Smith*, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 237; *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. 115.

⁴¹⁶ *Noll v. Smith*, 64 Ind. 511; *Cornell v. Nebeker*, 58 Ind. 425; *Phelan v. Moss*, 67 Pa. St. 59; *Zimmerman v. Rote*, 75 Pa. St. 188. So, where the condition was detached, and a blank time of payment filled in. *Elliott v. Levings*, 54 Ill. 213.

⁴¹⁷ *Ingham v. Primrose*, 7 C. B. (N. S.) 82.

another bank, crediting it as a special deposit subject to be checked out when paid, and sends it through the clearing house, and it is paid by the drawee bank in the drawer's absence, although overdraw-ing his account, and is afterwards repudiated by him as a forgery, but the bank receiving it as a deposit had in the meanwhile paid it out on the depositor's checks, the loss will fall on the drawee.⁴¹⁸ So, where a bank pays its own notes, which have been fraudulently raised, it cannot recover the payment, if it retains the notes for a long time before returning them.⁴¹⁹ But a failure for 14 days to give notice that an indorsement is a forgery will not estop the pretended in-dorser from setting up such defense.⁴²⁰ And one who deposits funds in a bank, and fails to examine his pass book and returned checks, will not be estopped by that fact alone from afterwards setting up against the bank the forgery of a check returned,⁴²¹ unless his previous conduct amounts to an equitable estoppel;⁴²² nor by maintaining silence at the request of an agent of the bank itself.⁴²³

But a party does not waive the defense of forgery by assenting to an extension of time on further security by the maker to the holder, where the notes were not shown him and he reserved all rights against other parties.⁴²⁴ So, if a bank depositor gives her attorney a check for half the amount as a loan, and he draws the balance of the deposit on a forged check, and afterwards deposits a smaller sum to the credit of the depositor, and it is drawn out by her and credited on the loan, she will not be estopped from recovering from the bank the amount paid out by it on the forged check.⁴²⁵

Whether there has been negligence and estoppel on the defend-

⁴¹⁸ *Commercial & Farmers' Nat. Bank v. First Nat. Bank of Baltimore*, 30 Md. 11.

⁴¹⁹ For 19 days, *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; or for 15 days, *Gloucester Bank v. Salem Bank*, 17 Mass. 33.

⁴²⁰ *McKenzie v. Linen Co.*, 44 Law T. 431.

⁴²¹ *Bank of British North America v. Merchants' Nat. Bank of New York City*, 91 N. Y. 106; *Janin v. Bank*, 92 Cal. 14, 27 Pac. 1100.

⁴²² *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657. And the depositor is only liable for ordinary care. *Frank v. Bank*, 84 N. Y. 209.

⁴²³ *Ogilvie v. Mortgage Co.* [1896] App. Cas. 257, distinguishing *McKenzie v. Linen Co.*, 6 App. Cas. 82.

⁴²⁴ *Bell v. Shields*, 19 N. J. Law. 93.

⁴²⁵ *Underhill v. Bank*, 32 Hun (N. Y.) 432.

ant's part is a question for the jury.⁴²⁶ But negligence on the part of a bona fide holder will not defeat his right to recover, where the maker has made the alteration possible by his own negligence, and the burden is on him in such case to show the plaintiff's knowledge of the alteration.⁴²⁷

Alteration—How Plead.

§ 1783. The defendant may set up the alteration of a bill under a plea of general issue.⁴²⁸ But if the declaration is upon the instrument as originally drawn, the alteration should be specially pleaded.⁴²⁹ And, where the acceptor of a bill claims his discharge by an alteration in the date of the bill, he must aver that it was altered after the acceptance.⁴³⁰ So, if the maker sets up the want of a stamp on the altered instrument, he must show in his plea that it could not have been restamped, as well as that it was not.⁴³¹ And, if he avers that it was altered by the addition of other signatures, he must show that this was done without his consent.⁴³²

Presumption as to Alterations.

§ 1784. The questions whether there has been any alteration, and, if so, when it was made, and by whom, and with what intention, are all questions of fact for the jury.⁴³³ So, it is for the jury to deter-

⁴²⁶ *Hardy v. Bank*, 51 Md. 562. It is not negligence to give a check for cash to a stranger who afterwards raises it. *National Bank of Virginia v. Nolting*, 94 Va. 263, 26 S. E. 826.

⁴²⁷ *Woolfolk v. Bank*, 10 Bush (Ky.) 504.

⁴²⁸ *Bytes, Bills*, 328; *Chit. Bills*, 208; 2 *Daniel, Neg. Inst.* 386; *Cock v. Coxwell*, 2 *Crompt., M. & R.* 291, 4 *Dowl.* 187, 1 *Gale*, 177; *Calvert v. Baker*, 4 *Mees. & W.* 417, 7 *Dowl.* 17; *Knight v. Clements*, 8 *Adol. & E.* 215; *Hirschman v. Budd*, L. R. 8 *Exch.* 171; *Boomer v. Koon*, 6 *Hun (N. Y.)* 645; *Lincoln v. Lincoln*, 12 *Gray (Mass.)* 45. And see *Leslie v. Emmons*, 25 *U. C. Q. B.* 243. And he may prove the alteration, in Delaware, without the statutory affidavit denying his signature. *Hollis v. Vandergrift*, 5 *Houst. (Del.)* 521.

⁴²⁹ *Bytes, Bills*, 329; *Hemming v. Trenery*, 9 *Adol. & E.* 926, 1 *Perry & D.* 661; *Mason v. Bradley*, 11 *Mees. & W.* 590; *Parry v. Nicholson*, 13 *Mees. & W.* 778.

⁴³⁰ *Langton v. Lazarus*, 5 *Mees. & W.* 629.

⁴³¹ *Bradley v. Bardsley*, 14 *Mees. & W.* 873.

⁴³² *Cotten v. Williams*, 1 *Fla.* 37.

⁴³³ *Chit. Bills*, 219; 2 *Pars. Notes & B.* 576; *Leykariff v. Ashford*, 12 *Moore*, (2515)

mine the time and circumstances in which a memorandum was made at the foot of a note;⁴³⁴ or whether a mark on the note is a blot or an erasure.⁴³⁵ Parol evidence is admissible to show the circumstances of making an alteration.⁴³⁶ And where words appear in a different ink and handwriting from that of the maker, and are declared by the maker to be an alteration, the question must be explained by the evidence, and cannot be decided by inspection by the court.⁴³⁷ It has been held that there is no presumption that an alteration was made at or before the time the paper was executed,⁴³⁸ or after its execution.⁴³⁹

On the other hand, some cases hold that it was *prima facie* before execution of the paper.⁴⁴⁰ But other cases hold, with more apparent reason, that an alteration apparent on the face of a note was made

281; *Knight v. Clements*, 8 Adol. & E. 215; *Bishop v. Chambre*, *Moody & M.* 116; *Newman v. Wallace*, 121 Mass. 323; *Cumberland Bank v. Hall*, 6 N. J. Law, 215; *Gooch v. Bryant*, 13 Me. 386; *Crabtree v. Clark*, 20 Me. 337; *Gillett v. Sweat*, 6 Ill. 475; *Hunter v. Parsons*, 22 Mich. 96; *Balley v. Taylor*, 11 Conn. 531; *Wallace v. Wallace*, 8 Ill. App. 69; *Wilson v. Henderson*, 9 Smedes & M. (Miss.) 375; *Commissioners of Poor of Horry Dist. v. Hanion*, 1 Nott & McC. (S. C.) 554; *Commercial & Railroad Bank of Vicksburg v. Lum*, 7 How. (Miss.) 414; *Farnsworth v. Sharp*, 4 Sneed (Tenn.) 55; *Vance v. Collins*, 6 Cal. 435; *Jones v. Ireland*, 4 Iowa, 63; *Cole v. Hills*, 44 N. H. 227; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527; *Bank of Cass Co. v. Morrison*, 17 Neb. 343, 22 N. W. 782; *Martin v. Kline*, 157 Pa. St. 473, 27 Atl. 753; *Yellow Medicine Co. Bank v. Tagley*, 57 Minn. 391, 59 N. W. 486.

⁴³⁴ *Tuckerman v. Hartwell*, 3 Me. 147.

⁴³⁵ *Clark v. Eckstein*, 22 Pa. St. 507.

⁴³⁶ *Heywood v. Perrin*, 10 Pick. (Mass.) 228.

⁴³⁷ *Sheldon v. Hawes*, 15 Mich. 519. And it may go to the jury on such evidence in the instrument. *Taylor v. Mosely*, 6 Car. & P. 273. But there must be some evidence to go to the jury. *Clark v. Eckstein*, 22 Pa. St. 507. And mere marks indicating a change in the number of a bond are not sufficient evidence. *Birdsall v. Russell*, 29 N. Y. 220.

⁴³⁸ *Ely v. Ely*, 6 Gray (Mass.) 439.

⁴³⁹ *Cumberland Bank v. Hall*, 6 N. J. Law, 215; *Balley v. Taylor*, 11 Conn. 531.

⁴⁴⁰ *Franklin v. Blake*, 48 Ohio St. 296, 27 N. E. 550; *Newman v. King*, 54 Ohio St. 273, 43 N. E. 683. If the instrument is not on its face suspicious, *Farnsworth v. Sharp*, 4 Sneed (Tenn.) 55; or in the case of a marginal memorandum, *Fletcher v. Blodgett*, 16 Vt. 26; or an alteration in the printed form only, *Corcoran v. Doll*, 32 Cal. 82; *Paramore v. Lindsley*, 63 Mo. 63; or a sealed note, *Pullen v. Shaw*, 14 N. C. 238.

prima facie after the instrument was executed, the burden being on the holder to show the contrary.⁴⁴¹ Where a bill is altered after its execution, the presumption is that it was altered by the holder.⁴⁴²

§ 1785. — Where an alteration is not apparent on the face of the instrument, the burden of proof is on the party alleging it.⁴⁴³ But if the defendant sets up an alteration apparent on the note, the burden is on the plaintiff to show that the note is in the form in which it was originally delivered.⁴⁴⁴ Where the alteration appears on the face of the paper, the holder must explain it, and show that it was made under such circumstances as not to vitiate the instrument;⁴⁴⁵

⁴⁴¹ *Hills v. Barnes*, 11 N. H. 395; *Heffner v. Wenrich*, 32 Pa. St. 423; *Walters v. Short*, 10 Ill. 252. And this is generally so, by implication at least, wherever the holder is put to the burden of explaining an apparent alteration.

⁴⁴² *Bowman v. Mitchell*, 79 Ind. 84; *Cochran v. Nebeker*, 48 Ind. 460; *Porter v. Doby*, 2 Rich. Eq. (S. C.) 49; *Burwell v. Orr*, 84 Ill. 465; *White v. Hass*, 32 Ala. 430.

⁴⁴³ *U. S. v. Linn*, 1 How. 104; *Davis v. Jenney*, 1 Metc. (Mass.) 221; *Odell v. Gallup*, 62 Iowa, 253, 17 N. W. 502; *Melkel v. Savings Inst.*, 36 Ind. 355; *Bumpass v. Timms*, 3 Sneed (Tenn.) 459; *Schroeder v. Webster*, 88 Iowa, 627, 55 N. W. 569; *Williamsburgh Sav. Bank v. Town of Solon*, 136 N. Y. 465, 32 N. E. 1058.

⁴⁴⁴ *Simpson v. Davis*, 119 Mass. 269; *Wilde v. Armsby*, 6 Cush. (Mass.) 314; *Cape Ann. Nat. Bank v. Burns*, 129 Mass. 596; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

⁴⁴⁵ *Ryles, Bills*, 329; *Benj. Chalm. Dig. art. 249*; *Chit. Bills*, 217; 2 *Daniel, Neg. Inst.* 430; 2 *Pars. Notes & B.* 577; *Johnson v. Marlborough*, 2 Starkle, 313; *Henman v. Dickinson*, 5 Bing. 183, 2 *Moore & P.* 280; *Ely v. Ely*, 6 Gray (Mass.) 439; *Hill v. Cooley*, 46 Pa. St. 259; *Dodge v. Haskell*, 69 Me. 429; *Smith v. Ferry*, 69 Mo. 142; *Elbert v. McClelland*, 8 Bush (Ky.) 577; *Frazer's Adm'r's v. Frazer*, 13 Bush (Ky.) 399; *Palne v. Edsell*, 19 Pa. St. 178; *Willett v. Shepard*, 34 Mich. 106; *Page v. Danaher*, 43 Wis. 221; *Barclift v. Treece*, 77 Ala. 528; *Farnsworth v. Sharp*, 4 Sneed (Tenn.) 55; *Hatch v. Dickinson*, 7 Blackf. (Ind.) 48; *Justus v. Cooper*, *Id.* 7; *Whitmer v. Frye*, 10 Mo. 348; *Wheat v. Arnold*, 36 Ga. 479; *Daniel v. Daniel*, *Dud.* (Ga.) 239; *McElroy v. Caldwell*, 7 Mo. 587; *Commercial & Railroad Bank of Vicksburg v. Lun*, 7 How. (Miss.) 414; *Low v. Merrill*, 1 Pin. (Wis.) 340; *Glover v. Gentry*, 104 Ala. 222, 16 South. 38; *Smith v. Eals*, 81 Iowa, 235, 46 N. W. 1110; *Croswell v. Labree*, 81 Me. 44, 16 Atl. 331; *National Ulster Co. Bank v. Madden*, 114 N. Y. 280, 21 N. E. 408; *Gowdey v. Robbins*, 3 App. Div. 353, 38 N. Y. Supp. 280; *Nagle's Estate*, 134 Pa. St. 31, 19 Atl. 434; *Hartley v. Corboy*, 150 Pa. St. 23, 24 Atl. 295; *Kennedy v. Moore*, 17 S. C. 464; *Elgin v. Hall*, 82 Va. 680; *Hodnett's Adm'r v. Pace's Adm'r*, 84 Va. 873, 6 S. E. 217.

especially where it is of a suspicious character and beneficial to the holder.⁴⁴⁶ So, where it is in a different handwriting from the rest of the paper.⁴⁴⁷ But the mere fact that part of an indorsement is written in different ink will not throw on the holder the burden of explaining it.⁴⁴⁸ A material alteration raises the presumption of fraud, and the holder will not be relieved from explaining it by a restoration of the paper to its original form.⁴⁴⁹ Even where the alteration was made by a stranger, the burden of proof is on the holder,⁴⁵⁰ as well as the burden of proving that it was made by consent.⁴⁵¹ But the consent of a maker will be presumed where the change was not apparent on the face of the paper, and was made while the paper was in the hands of another maker, and before it was issued.⁴⁵² If no alteration is apparent on the face of a note, it is admissible without proof that it had not been altered, notwithstanding some evidence that a note of like amount had been altered by the holder.⁴⁵³ An interest clause, written in different ink and handwriting, will not throw upon the holder the burden of proving that there was no alteration.⁴⁵⁴ So, an apparent change in the date by writing one figure over another will not be presumed to be a forgery.⁴⁵⁵ And the holder need not explain an apparent change in the date of an indorsement⁴⁵⁶ nor the erasure of an indorsement.⁴⁵⁷

⁴⁴⁶ *Huntington v. Finch*, 3 Ohio St. 445.

⁴⁴⁷ *Simpson v. Stackhouse*, 9 Pa. St. 186; *McMicken v. Beauchamp*, 2 La. 290; *Small v. Sloan*, 1 Bosw. (N. Y.) 352.

⁴⁴⁸ *Willson v. Harris*, 35 Iowa, 507.

⁴⁴⁹ *Robinson v. Reed*, 46 Iowa, 219.

⁴⁵⁰ *Davis v. Carlisle*, 6 Ala. 707.

⁴⁵¹ *Humphreys v. Gullow*, 13 N. H. 385.

⁴⁵² *Eddy v. Bond*, 19 Me. 461.

⁴⁵³ *Lowman v. Aubery*, 72 Ill. 619.

⁴⁵⁴ *Jones v. Ireland*, 4 Iowa, 63. But the addition of an interest clause raises a presumption of fraud. *Long v. Mason*, 84 N. C. 15.

⁴⁵⁵ *Sayre v. Reynolds*, 5 N. J. Law, 737.

⁴⁵⁶ *Sibley v. Fisher*, 7 Adol. & El. 444.

⁴⁵⁷ *Finney v. Turner*, 10 Mo. 207; *Hayden v. Goodnow*, 39 Conn. 164. But see, contra, in order to rebut the presumption of payment by such indorser, *Peel v. Kingsmill*, 7 U. C. Q. B. 304.

Alteration—How Proved.

§ 1786. The circumstances under which certain words were written may be shown to prove that they were an alteration or to disprove it.⁴⁵⁸ So, it may be shown that the instrument was in the same condition shortly after its date and before suit was brought.⁴⁵⁹ And a memorandum taken from a bill book of the witness is admissible evidence of an alteration, the witness having no recollection apart from his own memorandum made at the time.⁴⁶⁰ But the general accuracy of a book entry should be shown in order to make it admissible.⁴⁶¹

Expert evidence is admissible as to the genuineness of a bank note without proof of the signatures of the officers.⁴⁶² And the defendant may show that he never signed but one note like that in suit, and that one differed in a material respect.⁴⁶³ It may even be shown that former notes between the same parties (of which the note in suit was a renewal) had been altered, as tending to prove the alteration of the note in suit and to support suspicious erasures apparent on its face.⁴⁶⁴ But the alteration of other bills, not connected with that in controversy, cannot be offered as evidence of the alteration of the bill in question.⁴⁶⁵ And the mere appearance of a note is not sufficient evidence that it has been mutilated or altered.⁴⁶⁶

⁴⁵⁸ *National State Bank of Troy v. Rising*, 4 Hun (N. Y.) 703. So, that they were erased on the payee's refusal to take the note in that form. *Riley v. Gerrish*, 9 Cush. (Mass.) 104.

⁴⁵⁹ *Burnham v. Parkhurst*, 108 Mass. 341.

⁴⁶⁰ *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1.

⁴⁶¹ *Ortmann v. Bank*, 41 Mich. 482, 2 N. W. 677.

⁴⁶² *Johnson v. State*, 2 Ind. 652.

⁴⁶³ *Jourden v. Boyce*, 33 Mich. 302. So, to disprove the allegation of forgery. *Bardin v. Stevenson*, 75 N. Y. 164.

⁴⁶⁴ *Rankin v. Blackwell*, 2 Johns. Cas. (N. Y.) 198.

⁴⁶⁵ *Thompson v. Mosely*, 5 Car. & P. 501; *Balcetti v. Serani*, Peake, 192.

⁴⁶⁶ *Downs v. Webster*, Brayt. (Vt.) 79. E. g. by a figure apparently written over another in the date, *Sedgwick v. Sedgwick*, 56 Cal. 213; or by the payee's name being written in different colored ink over an erasure, *Smith v. McGowan*, 3 Barb. (N. Y.) 404. And an alleged alteration cannot be decided by inspection on a motion to strike out the answer. *Rogers v. Vosburgh*, 87 N. Y. 228.

CHAPTER XLV.**DEFENSE—ILLEGALITY AND FRAUD.**

-
- § 1787. Illegal Considerations.
1789. Statutory Prohibitions.
1790. Sunday Laws.
1791. Usury Laws.
1792. — By Corporation—National Banks.
1793. — When Admissible.
1794. — In Transfer.
1795. Usury—Recovery of Payment.
1796. — Recoupment.
1797. — Remedies.
1798. — Pleading and Evidence.
1799. Fraud—False Representation.
1800. — Misrepresentation and Concealment.
1801. — On Creditors.
1802. — Breach of Condition.
1803. — Diversion—Accommodation Paper.
1804. — Diversion to Other Payee.
1805. — Duress.
1806. Fraud in Inception.
1807. — In Transfer.
1808. — On Other Party.
1809. — By Other Party.
1810. — Rescission—Recovery.
1811. — Equitable Relief.
1812. — Waiver.
1813. — Pleading.
1814. — Evidence.

Illegal Considerations.

§ 1787. Illegality and fraud belong to the second class of defenses enumerated in the last chapter, which admit the execution of the instrument, but deny its effect. The question of illegal consideration has been already considered in detail. Thus, a note is illegal

(2520)

and void which is given to suppress a criminal prosecution,¹ or in payment for liquor sold in violation of law,² or for gambling debts.³ But in some statutes against gaming the rights of a bona fide holder are expressly reserved.⁴ A bill given for money borrowed for illegal speculations is void in the hands of a party with notice.⁵ An action will, however, lie against an agent for money received by him in the collection of such a bill.⁶ So, if A.'s debt for an illegal stock transaction is assumed by B., and secured by A.'s note to him, the illegal character of the original debt cannot be set up as a defense to the note.⁷ But the statute against gambling contracts need not be specially pleaded.⁸

§ 1788. — In like manner, a note is illegal which was given to procure for the maker a substitute or other discharge from duty in the army.⁹ So, more especially, a note to raise money for the use of Confederate troops;¹⁰ or a draft on the Confederate war department;¹¹ or a note to a municipal corporation for taxes assessed in aid of the Rebellion;¹² or cotton notes regarded as so issued under a statute of Mississippi during the war.¹³ But a note for the

¹ *Brown v. Padgett*, 36 Ga. 609. And see § 501, supra. And a seal will not preclude the defense. *Morrill v. Goodenow*, 65 Me. 178.

² *Glass v. Alt*, 17 Kan. 444. And part payments on it may be applied as set-off on another account. *Tolman v. Johnson*, 43 Iowa, 127. But the burden of proving the unlawful sale is on the defendant. *Brown v. McHugh*, 36 Mich. 433. And see §§ 532, 559, supra. And in NEW JERSEY a note to an inn-keeper for liquor sold and drunk on premises is void (2 Gen. St. p. 1792, § 27).

³ WISCONSIN (Sanb. & B. Ann. St. § 4538).

⁴ MAINE (Rev. St. c. 125, § 10; Id. c. 27, § 56); MICHIGAN (How. Ann. St. § 2027).

⁵ *National Bank of Metropolis v. Williams*, 46 Mo. 17.

⁶ *Williams v. Wall*, 60 Mo. 318.

⁷ *Bangs v. Hornick*, 30 Fed. 97. So, where the original note was given for merchandise sold in violation of law by the agent, who took the note and gave the payee his own note for it, the original consideration is no defense to the latter note. *Domestic Sewing-Mach. Co. v. Hatfield*, 58 Ind. 187.

⁸ *Watson v. Bayley*, 2 Cranch, C. C. 67, Fed. Cas. No. 17,276.

⁹ *O'Hara v. Carpenter*, 23 Mich. 410. And see § 496, supra.

¹⁰ *Slifer v. Howell's Adm'r*, 9 W. Va. 391; or to purchase supplies, *Lewis v. Latham*, 74 N. C. 283.

¹¹ *Cronly v. Hall*, 67 N. C. 9.

¹² *O'Byrne v. City of Savannah*, 41 Ga. 331.

¹³ *Taylor v. Thomas*, 22 Wall. 479. And a subsequent provisional govern-

transportation of cotton, even for the military board of the Confederate States, has been held to be lawful in the hands of a bona fide holder.¹⁴ Any alleged illegality by reason of intended aid to the enemy in war must be particularly pleaded.¹⁵ And a note is not void because it is given for the purchase of an interest in a partnership which has, among other business, a contract for the enemy's government.¹⁶

Statutory Prohibition.

§ 1789. There can be no recovery on a note or bill given for money due on a transaction prohibited by statute,¹⁷ although it will not be affected by a statute subsequently passed.¹⁸ The burden is on the defendant, however, to show that the instrument is within the statute relied on to render it void.¹⁹ If a statute, such as a usury law, in force when the note was made, is repealed afterwards, before suit brought, the original prohibition will no longer be available. A bank was not bound to receive them for taxes, although so receivable by their terms.

¹⁴ Kottwitz v. Alexander's Representatives, 34 Tex. 689. And illegality in a subsequent contract relating to the note will not affect its validity. Wilcoxon v. Logan, 91 N. C. 449.

¹⁵ Kimbro v. Bank, 49 Ga. 419.

¹⁶ Gullatt v. Thrasher, 42 Ga. 429.

¹⁷ Brown v. Tarkington, 3 Wall. 377. But a statutory prohibition under a penalty does not render the instrument void, Harris v. Runnels, 12 How. 79; Darby v. Institution, 1 Dill. 141, Fed. Cas. No. 3,571; although so held in Bacon v. Lee, 4 Iowa, 490. Thus, a premium note for premium for insurance to a company not authorized to do business in Indiana is not void, but action will be suspended on it until the law is complied with. American Ins. Co. v. Wellman, 69 Ind. 413.

¹⁸ Boyce v. Tabb, 18 Wall. 546. So, of a usury law, Cecil v. Hicks, 29 Grat. (Va.) 1; Hubbard v. Callahan, 42 Conn. 524; Newton v. Wilson, 31 Ark. 484; or a law making usury between maker and payee admissible at the suit of a bona fide holder, North Bridgewater Bank v. Copeland, 7 Allen (Mass.) 139. But a prohibition in a banking act as to banks "subsequently established" applies to a bank charter granted on the same day. Weed v. Snow, 3 McLean, 265, Fed. Cas. No. 17,347.

¹⁹ Bayley v. Taber, 6 Mass. 451. E. g. that a premium note to a foreign insurance company was made in a place where it was not authorized to do business. American Ins. Co. v. Woodruff, 34 Mich. 6; Same v. Cutler, 36 Mich. 261; Finch v. Insurance Co., 87 Ind. 302.

able as a defense.²⁰ So, a change of law allowing a higher rate of interest will apply to a banking act previously passed, authorizing loans at the legal rate.²¹ And if a note draws a rate of interest which is then illegal, but is afterwards made valid, the subsequent repeal of the validating act will not render the note again invalid.²² If a bill is given after the repeal of a usury law, in renewal of a bill or for a loan which was originally usurious by the law then in force, it will be purged of the original defect.²³ A foreign prohibition by the law of the drawee's residence will not discharge an English drawer.²⁴ And courts will not enforce foreign statutory penalties.²⁵

Sunday Laws.

§ 1790. The delivery of a bill on Sunday does not render it void at common law; and it has been held, therefore, that the law of another state, where it was made, will not be presumed to prohibit it.²⁶ And the statute of such state invalidating the bill must be specially pleaded.²⁷ Where a Sunday bill or note is illegal, it must be shown to have been delivered, as well as dated, on that day.²⁸ Thus, an accommodation note made on Sunday, but indorsed and negotiated by the payee on Monday, has been held to be good.²⁹

²⁰ *Holmes v. French*, 68 Me. 525; *Nicholls v. Gee*, 30 Ark. 135; *Smith v. Glanton*, 39 Tex. 365. But see, contra, *Pond v. Horne*, 65 N. C. 84; *Ayres v. Probasco*, 14 Kan. 175. To the effect that such act is constitutional, see *Welch v. Wadsworth*, 30 Conn. 149.

²¹ *Cameron v. Pank*, 37 Mich. 240.

²² *First Ecclesiastical Soc. v. Loomis*, 42 Conn. 570.

²³ *Flight v. Reed*, 1 Hurl. & C. 703; *Houser v. Bank*, 57 Ga. 95.

²⁴ *Mellish v. Simeon*, 2 H. Bl. 378.

²⁵ *Blaine v. Curtis*, 59 Vt. 120, 7 Atl. 708, and 24 Cent. Law J. 229. In MICHIGAN (*How. Ann. St. § 1601*), usury by a foreign statute cannot be set up, unless the rate is also usurious by Michigan statute.

²⁶ *Murphy v. Collins*, 121 Mass. 6. And see § 520, *supra*. But, as to the presumption of similar statute law in other states, see § 41, *supra*.

²⁷ *Geer v. Putnam*, 10 Mass. 312; and in Georgia it must be averred that it was given in the maker's "ordinary calling." *Sanders v. Johnson*, 29 Ga. 526.

²⁸ *Conrad v. Kinzie*, 105 Ind. 281, 4 N. E. 833; and it will be valid if delivered on another day, though signed on Sunday, *Hall v. Parker*, 37 Mich. 590; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331. And see § 225, *supra*.

²⁹ *Bank of Cumberland v. Mayberry*, 48 Me. 198.

On the other hand, a note actually made on Sunday is of no effect in the hands of a holder with notice, although dated on Saturday.³⁰ So, if made on Sunday in renewal of an old note, and delivered on that day to the holder's agent, although not delivered by the agent to the holder until the next day.³¹ In Missouri a note is not void because made on Sunday.³² On the other hand, in Maine, it has even been held that a Sunday note cannot be ratified by a subsequent promise to pay it, made on a business day.³³ And it seems that a payment of interest made on such note on a week day will not amount to a new promise of payment.³⁴ But it has been held that the collection on Wednesday of a check given for the purchase of a note on Sunday is an affirmation of the note.³⁵ If a note is given on Sunday, it will make no difference that the consideration was goods purchased or an account stated and settled on a week day.³⁶ So, a note given on a week day will not be binding, if the consideration was a tort growing out of an unlawful Sunday contract.³⁷

Usury Laws.

§ 1791. A note is not usurious because it is drawn by mistake for too large a sum,³⁸ although a discount at an unlawful rate, made in ignorance of the law, would be usurious, and discharge the indorser.³⁹ A note will not, however, be rendered invalid by a subsequent agreement for usury, made after its maturity,⁴⁰ or by a separate note taken for usurious interest.⁴¹ And, if a valid note

³⁰ *Allen v. Deming*, 14 N. H. 133.

³¹ *Stevens v. Wood*, 127 Mass. 123; *Davis v. Barger*, 57 Ind. 51.

³² *Glover v. Cheatham*, 19 Mo. App. 656; especially if given for a prior and valid debt, *Kaufman v. Hamm*, 30 Mo. 387.

³³ *Pope v. Linn*, 50 Me. 83. But see, contra, *Tucker v. West*, 29 Ark. 386.

³⁴ *Reeves v. Butcher*, 31 N. J. Law, 224.

³⁵ *Campbell v. Young*, 9 Bush (Ky.) 240.

³⁶ *Foreman v. Ahl*, 55 Pa. St. 325; *Morgan v. Bailey*, 59 Ga. 683; *Miller v. Lynch*, 38 Miss. 344; *McAuley v. Reynolds*, 64 Me. 136.

³⁷ *Tillock v. Webb*, 56 Me. 100. But see, contra, where the consideration was a Sunday contract, *Kountz v. Price*, 40 Miss. 341.

³⁸ *Lusk v. Campbell*, 3 Hun (N. Y.) 607.

³⁹ *Bank of Salina v. Alvord*, 31 N. Y. 473.

⁴⁰ *Dell v. Oppenheimer*, 9 Neb. 454, 4 N. W. 51.

⁴¹ *Cooper v. Tappan*, 4 Wis. 362.

is pledged as collateral for a usurious debt, it may be collected, to the extent of the sum legally due.⁴² On the other hand, if usury taints a note, it will also affect a collateral mortgage given to secure it;⁴³ but not a mortgage previously made to the maker, and transferred by him as collateral.⁴⁴ The defense of usury is, however, a personal one, and cannot be set up by the purchaser of premises covered by a collateral mortgage.⁴⁵

Usury by Corporation—National Bank Act.

§ 1792. In some states corporations are forbidden by statute to set up the defense of usury.⁴⁶ And in Minnesota building associations are specially exempted from the operation of the usury law.⁴⁷ In general, a banking corporation taking a note or bill is subject to the usury laws in the same manner as a private individual.⁴⁸ And usury is admissible against a national bank in a suit brought by it in the state courts, although such courts might not have had original jurisdiction in the matter.⁴⁹

By the national bank act such corporations are allowed to make discounts at the rate allowed by the local law, and no more, unless by such local law a special rate is allowed to such banks. And when there is no rate fixed by the local law the rate is limited to 7 per cent., and the entire interest is forfeited, if such law is violated, and twice the amount of usury paid may be recovered in an action brought for that purpose within two years.⁵⁰ This act has been

⁴² *Partridge v. Williams*, 72 Ga. 307.

⁴³ *Kleeman v. Frisbie*, 63 Ill. 482.

⁴⁴ *Stevens v. Reeves*, 33 N. J. Eq. 427.

⁴⁵ *Reed v. Eastman*, 50 Vt. 67; *Loomis v. Eaton*, 32 Conn. 550; *Town of Reading v. Town of Weston*, 7 Conn. 409.

⁴⁶ ILLINOIS (Hurd's Rev. St. c. 74, § 11); NEW YORK (Birdseye's Rev. St. p. 1665, §§ 16, 17); WEST VIRGINIA (Code, c. 52, § 22); WISCONSIN (Sanb. & B. Ann. St. § 1690).

⁴⁷ In MINNESOTA (Gen. St. §§ 2218, 2794, 2879). But see, contra, in Nebraska, *Lincoln Bldg. & Sav. Ass'n v. Graham*, 7 Neb. 173.

⁴⁸ *Farmers' & Traders' Bank v. Harrison*, 57 Mo. 503; notwithstanding the custom of the bank, *Niagara Co. Bank v. Baker*, 15 Ohio St. 68; *Bank of Utica v. Hillard*, 5 Cow. (N. Y.) 153.

⁴⁹ *National Bank of Winterset v. Eyre*, 52 Iowa, 114, 2 N. W. 995.

⁵⁰ UNITED STATES (Rev. St. §§ 5197, 5198).

held to apply both to accommodation and business paper, and to discounts made in a state like New York, where a rate of interest is fixed by law, but no rate of discount.⁵¹ In Massachusetts it has been held that this act supersedes the state usury laws as to national banks.⁵² But in New York the penalties of the state usury law have been held to apply to national banks.⁵³

Usury—When Admissible.

§ 1793. Usury in the making of a bill renders it void as against all parties.⁵⁴ And it may be set up in a suit brought by or against the party's personal representatives.⁵⁵ The acceptor of a bill may set up usury, to which he is not a party, between the drawer and the indorsee who brings suit.⁵⁶ So, a surety may avail himself of usurious payments made by his principal for the purpose of obtaining an extension, and may have such payments credited in his own discharge.⁵⁷ And in Georgia it is provided by statute that a surety may recover against his principal the amount paid by him in taking up a note without notice that it was originally tainted with and included usury, and that the principal intended to resist its payment on that ground.⁵⁸ But, if the right to recover usurious payments made by the maker on a note secured by mortgage has been released by him, they cannot afterwards be set up by a later mortgagee for his own benefit.⁵⁹ A surety is not, in general, discharged by usury

⁵¹ *Johnson v. Bank*, 74 N. Y. 329.

⁵² *Davis v. Randall*, 115 Mass. 547; *Central Nat. Bank v. Pratt*, Id. 539; *National Bank of Winterset v. Eyre*, 52 Iowa, 114, 2 N. W. 905; *First Nat. Bank of Columbus v. Garlinghouse*, 22 Ohio St. 492. And see *Bramhall v. Bank*, 36 N. J. Law, 243.

⁵³ The double interest not being recoverable under the national bank act, *Hintermister v. Bank*, 3 Hun (N. Y.) 345; but the usurious contract being wholly void, *First Nat. Bank of Whitehall v. Lamb*, 50 N. Y. 95, reversing 57 Barb. 429; as to this case, see remarks of Bedle, J., in *Bramhall v. Bank*, 36 N. J. Law, 247.

⁵⁴ *Armour v. Moore*, 5 Ill. App. 433. As against indorsees, see chapter 47, *infra*.

⁵⁵ *Fox v. Whitney*, 16 Mass. 118.

⁵⁶ *Akers v. Demond*, 103 Mass. 318.

⁵⁷ *Lemmon v. Whitman*, 75 Ind. 318.

⁵⁸ GEORGIA (Civ. Code, § 2982).

⁵⁹ *Churchill v. Cole*, 32 Vt. 93.

between his principal and the holder of the note.⁶⁰ And where the principal is barred, as a corporation, from the defense of usury, it cannot be set up by the surety⁶¹ or indorser.⁶² But it has been held that one who indorses a corporation bill, after indorsement by officers of the corporation, to facilitate a sale for its benefit, is not a guarantor, and may set up usury in the sale by the maker's agent, although the company could not do so.⁶³

Usury in Transfer.

§ 1794. The maker of a note cannot set up in an action against himself that the note was indorsed and discounted at a usurious rate.⁶⁴ And this is true, also, under the national bank act.⁶⁵ Even an accommodation maker cannot set up that the note was sold at a usurious discount by the payee, for whose accommodation it was made.⁶⁶ A note may be sold at any discount, but, if it is given as mere security for a usurious loan, the indorsee cannot recover.⁶⁷

In like manner, an indorser cannot set up usury between maker and payee,⁶⁸ or between himself and a prior indorser.⁶⁹ And the indorser of a note which has been discounted for the maker cannot set up that it was given in renewal of a note in which usurious interest was taken by the same payee.⁷⁰ If A. indorses a note for a balance due on a usurious account between the maker and the payee, and afterwards takes it up, and gives his own note to the payee for it, he can-

⁶⁰ First Nat. Bank of Winterset v. Garlinghouse, 22 Ohio St. 492. And see § 921, *supra*.

⁶¹ First Nat. Bank of New York v. Morris, 1 Hun (N. Y.) 680.

⁶² Union Nat. Bank v. Wheeler, 60 N. Y. 612; Stewart v. Bramhall, 74 N. Y. 85, affirming 11 Hun, 139.

⁶³ Bock v. Lauman, 24 Pa. St. 435.

⁶⁴ Nichols v. Fearson, 7 Pet. 103; Knights v. Putnam, 3 Pick. (Mass.) 184; Newman v. Williams, 29 Miss. 212; Capital City Ins. Co. v. Quinn, 73 Ala. 558.

⁶⁵ Importers' & Traders' Nat. Bank v. Littell, 47 N. J. Law, 233.

⁶⁶ Gaul v. Willis, 26 Pa. St. 250.

⁶⁷ Durant v. Ranta, 27 N. J. Law, 624. And see § 523, *supra*.

⁶⁸ McKnight v. Wheeler, 6 Hill (N. Y.) 402. Although he indorsed without recourse, Challiss v. McCrum, 22 Kan. 157.

⁶⁹ Morford v. Davis, 28 N. Y. 481.

⁷⁰ Bly v. Bank, 79 Pa. St. 453.

not deduct the original usury paid as a set-off against his own note.⁷¹ But an accommodation indorser may avail himself of usury on the part of the maker.⁷²

Usury—Recovery of Payment.

§ 1795. Some states provide by statute for the recovery of all usurious interest paid,⁷³ or of double⁷⁴ or even treble the amount paid.⁷⁵ And, if the maker is obliged to pay the face of the note to a bona fide holder, he may recover the usurious excess paid by him, in an action against the payee.⁷⁶ But usury voluntarily paid cannot, in general, be recovered.⁷⁷ If the statute prohibits an agreement in writing for payments beyond a certain rate, the prohibition will be waived by a verbal agreement for such payment, actually performed.⁷⁸ And, when an action is brought to recover usurious payment, an accord and satisfaction of usury will be a complete defense.⁷⁹

⁷¹ *Craig v. Butler*, 9 Mich. 21.

⁷² *National Bank of Auburn v. Lewis*, 75 N. Y. 516, reversing 10 Hun, 468; *Newport Nat. Bank v. Tweed*, 4 Houst. (Del.) 225.

⁷³ MINNESOTA (Gen. St. § 2213); MISSISSIPPI (Ann. Code, § 2348). And see § 521, *supra*. So, in LOUISIANA, where the suit must, however, be brought within one year. *Walker v. Villavaso*, 18 La. Ann. 718.

⁷⁴ NORTH CAROLINA (Code, § 3836), if the action is brought within two years.

⁷⁵ WISCONSIN (Sanb. & B. Ann. St. § 1691), if action is brought within one year after payment.

⁷⁶ *Kock v. Block*, 29 Ohio St. 565. So, by statute in MINNESOTA (Gen. St. § 2214).

⁷⁷ *Riddle v. Rosenfeld*, 103 Ill. 600; *Kinney v. Sherman*, 28 Ill. 519; *Reed v. Loan Co.*, 160 Mass. 237, 35 N. E. 677.

⁷⁸ *Nutting v. McCutcheon*, 5 Minn. 382 (Gil. 310).

⁷⁹ *Rogers v. Ball*, 54 Ga. 15. But the penalty provided for usury in the national bank act cannot be used as a set-off. *Danforth v. Bank*, 1 C. C. A. 62, 48 Fed. 271; *National Bank of Rahway v. Carpenter*, 52 N. J. Law, 165, 19 Atl. 181; *Barnet v. Bank*, 98 U. S. 555. And see § 526, *supra*. And this rule is now applied in New York to state banks (which are by statute put on the footing of national banks), *Caponigri v. Altieri* (Sup.) 51 N. Y. Supp. 418; although at first held otherwise in the same case, 21 Misc. Rep. 510, 47 N. Y. Supp. 715, and 22 Misc. Rep. 101, 48 N. Y. Supp. 808.

Recoupment of Usury.

§ 1796. Where usurious interest has been paid on a note, it may be set off against it, to reduce the balance due.⁸⁰ And such payment will be regarded as a payment on account of the principal debt, and not a mere set-off, which might be barred as such by the statute of limitations.⁸¹ And such excessive payment on the original note may be set up as a counterclaim against the renewal.⁸² And even a voluntary payment of usury, which could not be recovered, as we have seen, may be used as a counterclaim in recoupment.⁸³ Such payments are recouped by applying the amount to the lawful interest accrued at the date of payment, and afterwards to reduction of the principal.⁸⁴

The maker of a note, who has paid usurious interest on it, may treat it as a payment on account of principal, or avail himself of it as a set-off.⁸⁵ But he cannot set off on one note a usurious payment made on another note, although between the same parties.⁸⁶ And if usury is voluntarily paid on a contract originally usurious, after the passage of a law making the rate reserved in it legal, it cannot be recouped as a usurious payment.⁸⁷ A note may be purged of usury, if the illegal interest is refunded, and a new agreement made for legal interest only in future.⁸⁸ And in Maine the holder may recover costs on a usurious note, if he reduces it voluntarily before trial to the amount lawfully due.⁸⁹

⁸⁰ *National Bank of Auburn v. Lewis*, 75 N. Y. 516, reversing 10 Hun, 468; *Thomas v. Shoemaker*, 6 Watts & S. (Pa.) 179; *Wilkinson v. Wooten*, 59 Ga. 584; *House v. Davis*, 60 Ill. 367; *Richards v. Kountze*, 4 Neb. 200.

⁸¹ *Union Nat. Bank v. Fraser*, 63 Miss. 231.

⁸² *National Bank of Madison v. Davis*, 8 Bliss. 100, Fed. Cas. No. 10,038.

⁸³ *Mitchell v. Lyman*, 77 Ill. 525.

⁸⁴ *Lemmon v. Whitman*, 75 Ind. 318. And in Indiana it can only be recouped and not recovered, *Holcraft v. Mellott*, 57 Ind. 539.

⁸⁵ *Lewis v. Jewett*, 51 Vt. 378.

⁸⁶ *Ewing v. Griswold*, 43 Vt. 400. So, under the national bank act, *Barnet v. Bank*, 98 U. S. 555.

⁸⁷ *Sims v. Squires*, 80 Ind. 42.

⁸⁸ *Phillips v. Association*, 53 Iowa, 719, 6 N. W. 121.

⁸⁹ *Knight v. Frank*, 48 Me. 320; but not by a mere indorsement after suit brought without the maker's knowledge, *Gray v. Brown*, 49 Me. 544.

Remedies in Case of Usury.

§ 1797. Where a contract is usurious, the right to recover is determined by statute, and varies in the different states. Thus, the holder may recover the principal with legal interest,⁹⁰ or the principal alone, all the interest being forfeited,⁹¹ or all recovery may be barred, as in New York. A court of equity will restrain the sale of land deeded in trust to secure a usurious note on the payment of the principal and legal interest.⁹² And in Illinois the statute allowing equitable relief has been held to take the place of common-law remedies previously existing.⁹³ In Minnesota provision is made for proceedings in equity to declare a usurious bill or note void and have it canceled, and to have all proceedings upon it at law enjoined.⁹⁴ But the New York statute allowing equitable relief to a "borrower," without offer on his part to pay principal or interest, has been held not to apply to the accommodation indorser of a usurious note.⁹⁵ Usury in a note is no ground, however, for vacating in a collateral proceeding a judgment entered on the note by confession.⁹⁶

Usury—How Pleaded and Proved.

§ 1798. The defense of usury is not favored by the courts, and the party setting it up must prove all the facts necessary to establish it.⁹⁷ And in Maryland he is required by statute to state the particu-

⁹⁰ *Tuxbury v. Abbott*, 59 Me. 466.

⁹¹ *Lanier v. Cox*, 65 Ga. 265; and a verbal agreement for usurious interest may have that effect, *Rozelle v. Dickerson*, 63 Miss. 538.

⁹² *Beard v. Bingham*, 76 N. C. 285. The collateral remains valid security for the amount legally due. *Partridge v. Williams*, 72 Ga. 807.

⁹³ *Carter v. Moses*, 39 Ill. 539.

⁹⁴ MINNESOTA (Gen. St. § 2217).

⁹⁵ *Allerton v. Belden*, 49 N. Y. 373, reversing 3 Lans. (N. Y.) 492; *Birdseye's Rev. St. p. 1664*, § 18.

⁹⁶ *Black v. Pattison*, 61 Miss. 599.

⁹⁷ *Cutler v. Wright*, 22 N. Y. 472. But it is sufficient to set up the facts from which it is to be inferred, *Maule v. Crawford*, 14 Hun (N. Y.) 193; *Laird v. Hodges*, 26 Ark. 356; *Jordan v. Mitchell*, 25 Ark. 258; *Pillsbury v. McNally*, 22 Ark. 409; and see, as to pleading usury under the national bank act, *National Bank of Auburn v. Lewis*, 75 N. Y. 516, reversing 10 Hun, 468.

lars as to time and amount, in pleading usury.⁹⁸ The burden of proof is on a defendant who alleges that a note is usurious.⁹⁹ And usury will not be presumed merely because interest is agreed on from a date prior to the actual making of the note,¹⁰⁰ or because the agent who made the loan for the maker has taken usury.¹⁰¹ But if a judgment is rendered in an action for the interest, finding the note to be usurious, it will be conclusive evidence in an action between the same parties for the principal of the note.¹⁰² And, if a lender forces personal property on a borrower as part of the loan made to him on discounting the bill, the burden will be on the holder to disprove the usury implied by showing the actual value of the property transferred.¹⁰³

If usury is set up as a defense to a note made in another state, the rate being greater than that allowed by the *lex fori*, it has been held that the plaintiff must prove that the note was lawful where it was made.¹⁰⁴ A party may prove that a note was void for usury at the time of its inception.¹⁰⁵ And it has been held that other dealings between the same parties are admissible as evidence of this.¹⁰⁶ Parol evidence is admissible to show an agreement for usurious interest, and to prove that it was paid.¹⁰⁷ But where any rate is valid if agreed upon, as in California, a parol agreement made there for a high rate of interest will be sufficient consideration for a note afterwards given for such accrued interest in another state on paying off the principal.¹⁰⁸

⁹⁸ MARYLAND (Pub. Gen. Laws, art. 49, § 5).

⁹⁹ *Williams v. Banks*, 19 Md. 22; *Gillette v. Ballard*, 25 N. J. Eq. 491; *Moody v. Hawkins*, 25 Ark. 191.

¹⁰⁰ *Andrews v. Hart*, 17 Wis. 297; *Rutherford v. Smith*, 28 Tex. 322.

¹⁰¹ *Algur v. Gardner*, 54 N. Y. 360.

¹⁰² *Newton v. Hook*, 48 N. Y. 676.

¹⁰³ *Davis v. Hardacre*, 2 Camp. 375.

¹⁰⁴ *Camp v. Randle*, 81 Ala. 240, 2 South. 287.

¹⁰⁵ *Stafford v. Rice*, 5 Cow. (N. Y.) 23.

¹⁰⁶ *Seekel v. Norman*, 71 Iowa, 264, 32 N. W. 334; as to the amount of evidence necessary, see *Bayliss v. Cockcroft*, 81 N. Y. 363.

¹⁰⁷ *Rohan v. Hanson*, 11 Cush. (Mass.) 44; e. g. to support a recovery of usury paid by showing that other notes had been given for usurious interest only, and paid, *Jackson v. Kirby*, 37 Vt. 448.

¹⁰⁸ *Rose v. Phillips*, 33 Conn. 570.

Fraud—False Representation.

§ 1799. Commercial paper, like other contracts, is rendered void by fraud. This is true if it is induced by false representation;¹⁰⁹ e. g. to the effect that an accommodation note was business paper;¹¹⁰ or as to the construction of a road on which the note was conditioned,¹¹¹ or a pretended request of the maker that the defendant should sign as surety.¹¹² So, it has been held, where the defendant, holding under a blank indorsement (as security for a loan that had been paid), was fraudulently induced to believe that he could only return the note with his indorsement.¹¹³ So, where an illiterate person is induced to sign a paper, without negligence on his part, by misrepresentation as to its character.¹¹⁴ So, where the maker of an outlawed note was induced to renew by false representations as to the fact of its being outlawed.¹¹⁵

Mere ignorance that a provision is contained in a note does not amount to fraud, and is no defense.¹¹⁶ The fraud may consist, however, in a fraudulent exaggeration of an injury for which the note was given;¹¹⁷ or in a false statement as to the amount the payee had

¹⁰⁹ Byles, Bills, 214; Benj. Chalm. Dig. art. 94; 1 Edw. Bills & N. 458; Grew v. Bevan, 3 Starkie. 134; Lenheim v. Fay, 27 Mich. 70; Elsass v. Institute, 77 Ind. 72; Armstrong v. Cook, 30 Ind. 22; Beall v. January, 62 Mo. 434; Nat. Bank of Lancaster v. Mackey (Kan. App.) 49 Pac. 324; Millard v. Barton, 13 R. I. 610; Wilbur v. Prior, 67 Vt. 508, 32 Atl. 474; Wenzel v. Shulz, 78 Cal. 221, 20 Pac. 404.

¹¹⁰ Webb v. Odell, 49 N. Y. 583. But see, contra, Trask v. Wingate, 63 N. H. 474, 3 Atl. 926.

¹¹¹ Taylor v. Fletcher, 15 Ind. 80.

¹¹² Hall v. Clopton, 56 Miss. 555.

¹¹³ Shaw v. Stein, 79 Mich. 77, 44 N. W. 419.

¹¹⁴ Anderson v. Walter, 34 Mich. 113; Kagel v. Totten, 59 Md. 447; Briggs v. Ewart, 51 Mo. 245. So, where the maker was old and sick, and otherwise disabled by drugs and by poor eyesight, Mitchell v. Tomlinson, 91 Ind. 167; or where his attention was fraudulently diverted, Anderson v. Field, 6 Ill. App. 307. And see § 1873, *infra*, as to effect of negligence.

¹¹⁵ Brown v. Rice's Adm'r, 26 Grat. (Va.) 467.

¹¹⁶ Downey v. Beach, 78 Ill. 53; and the maker's negligence, without fraud on the payee's part, is no defense, Carpenter v. Bank, 119 Ill. 352, 10 N. E. 18; nor his illiteracy, Weller's Appeal, 103 Pa. St. 594.

¹¹⁷ Thompson v. Hinds, 67 Me. 177.

expended on the property for which the note was given,¹¹⁸ or as to the value of collateral on the strength of which the surety was induced to sign,¹¹⁹ or even as to the value of the property purchased.¹²⁰ So, if the payee obtains a note by a false statement as to the amount paid by him to a third party for the maker, the note will be void to the extent of the misrepresentation.¹²¹

Misrepresentation and Concealment.

§ 1800. To render a bill void, the false representation must be material, and must have induced the party to execute or deliver the paper.¹²² A note will not be rendered void by misrepresentation as to its legal effect,¹²³ or in another matter,¹²⁴ or, by a third party, to the effect that the principal debtor's wife, for whose benefit the note was made, was entitled to a large share in her father's estate, and the surety would never be called on to pay.¹²⁵ So, where a purchaser sees the land before giving his note for it, he will not be discharged by a fraudulent representation as to its value.¹²⁶

Fraudulent concealment of a material fact has the same effect as a false statement. This is so where the maker refuses to sign a note with a certain surety, and the surety is afterwards induced to sign it, without knowledge of such refusal;¹²⁷ or where a maker gives his note for a check, and the seller fails to inform him that the drawer's paper had been protested, although the seller's informant had told him he believed the drawer's paper to be good.¹²⁸ So, the acceptor

¹¹⁸ *Keller v. Vowell*, 17 Ark. 445.

¹¹⁹ *Bank of Metropolis v. Jones*, 8 Pet. 12.

¹²⁰ *Archer v. Bamford*, 3 Starkie, 175; but not a mere representation as to the value of the merchandise for which the note was given, without other material facts, *McComas v. Haas*, 98 Ind. 276.

¹²¹ *Griffiths v. Parry*, 16 Wis. 218.

¹²² *Hodges v. Torrey*, 28 Mo. 99; but even a fraudulent representation by a bona fide holder as to the amount paid by him, made to induce the maker to execute a renewal to him, will not constitute a material defense, *Murphy v. Lucas*, 58 Ind. 360.

¹²³ *Jaggard v. Winslow*, 30 Minn. 263, 15 N. W. 242.

¹²⁴ *Ingram v. Jordan*, 55 Ga. 356.

¹²⁵ *Shropshire v. Kennedy*, 84 Ind. 111.

¹²⁶ *Sprowls v. McCloud* (Pa. Sup.) 6 Atl. 920.

¹²⁷ *Conger v. Bean*, 58 Iowa, 321, 12 N. W. 284.

¹²⁸ *Brown v. Montgomery*, 20 N. Y. 287.

may have an action for deceit, where his acceptance has been obtained by the production of a bill of lading as security, without information (possessed by the holder) that steps were being taken to reclaim the goods.¹²⁹ So, where an indorser is induced to sign composition notes without being informed that the holder did not concur in the composition.¹³⁰ But the failure to inform him that the payee had taken the maker's note for the balance due him has been held not to amount to fraud.¹³¹ So, an agreement between the maker and holder of a note not to inform the surety of its nonpayment is not such a fraud as will discharge the surety.¹³² But a transfer in good faith of a draft on a bank after it had become insolvent is not void.¹³³

Fraud on Creditors.

§ 1801. A note made in fraud of creditors is void between the parties,¹³⁴ as against an indorsee after maturity and for collection only.¹³⁵ But an indorsement made to defraud the indorser's creditor cannot be set up by the indorser for his own benefit;¹³⁶ nor by the maker against the indorsee,¹³⁷ and it is valid in the hands of a bona fide holder, to the extent of the value paid.¹³⁸ A note made to B., instead of his partner, A., in order to defraud A.'s creditors, will not be enforced in the hands of the payee.¹³⁹ But, where the maker

¹²⁹ *March v. Bank*, 4 Hun (N. Y.) 466.

¹³⁰ *Doughty v. Savage*, 28 Conn. 146.

¹³¹ *Booth v. Storrs*, 75 Ill. 438. But, if the maker falsely represents the composition as equal, the creditor may recover the balance due on his original debt, without rescinding the composition. *Broadway Sav. Bank v. Schmucker*, 7 Mo. App. 171.

¹³² *Grover v. Hoppuck*, 26 N. J. Law, 191.

¹³³ *In re Oriental Bank*, 28 Ch. Div. 634.

¹³⁴ *Sternburg v. Bowman*, 103 Mass. 325; *Stevens v. Parker*, 7 Allen (Mass.) 361; *Church v. Muir*, 33 N. J. Law, 318. And see § 508, *supra*. But the payee's administrator may enforce a note made to him for goods fraudulently transferred to the maker to evade an attachment against the payee. *Martin v. Root*, 17 Mass. 222.

¹³⁵ *Powell v. Inman*, 52 N. C. 28.

¹³⁶ *Church v. Muir*, 33 N. J. Law, 318.

¹³⁷ *Miller v. McNair*, 65 Wis. 452, 27 N. W. 333.

¹³⁸ *Armstrong v. Bank*, 41 Fed. 234.

¹³⁹ *Ager v. Duncan*, 50 Cal. 325. So, if the note is for goods sold by the payee to defraud his creditors. *Harwood v. Knapper*, 50 Mo. 456.

sets up a want of consideration, the payee cannot avail himself, in rebuttal, of the fraud on the maker's creditors.¹⁴⁰ And in Vermont the maker cannot set up, even against the original payee, that the note was made to defraud his own creditors.¹⁴¹

Fraudulent Breach of Condition.

§ 1802. The nonperformance of a promise to be performed in the future does not amount to a fraud,¹⁴² unless the payee obtains the note upon a false pretense that he will do something, which he immediately afterwards declares he will not do.¹⁴³ If a note is delivered upon an express condition that another shall sign as surety before it is issued, and it is negotiated without such additional signature, the original surety will not be liable,¹⁴⁴ and he may have relief in equity.¹⁴⁵ But an agreement that another surety shall be obtained, "if possible," will not constitute a defense.¹⁴⁶ And if a surety signs a note on condition of another surety being obtained, but delivers it to the payee, the condition will be discharged, since the note cannot be delivered in escrow to the payee.¹⁴⁷ So, if the accommodation maker of a note deposits it with the creditor until the accommodated payee should give another note to replace it, and he never does so, it will be no defense.¹⁴⁸ So, if the condition of an accommodation acceptance (that he should pay only when collected) was omitted by mistake.¹⁴⁹

¹⁴⁰ *Wearse v. Peirce*, 24 Pick. (Mass.) 141.

¹⁴¹ *Carpenter v. McClure*, 39 Vt. 9; Gen. St. p. 672, § 33. So, the maker cannot set up that the note sued on was made for a composition with creditors, and the maker fraudulently gave the payee an additional bill for the balance due him. *Howden v. Haigh*, 11 Adol. & E. 1033.

¹⁴² *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10.

¹⁴³ *Wienholt v. Spitta*, 3 Camp. 376.

¹⁴⁴ *Awde v. Dixon*, 6 Exch. 869; *Cowan v. Baird*, 77 N. C. 201. But it is otherwise as to a stipulation between principal and surety, of which the payee had no knowledge. *Whitcomb v. Miller*, 90 Ind. 384.

¹⁴⁵ *Majors v. McNeilly*, 7 Helsk. (Tenn.) 294.

¹⁴⁶ *Harris v. Atchinson*, 2 Ill. App. 587.

¹⁴⁷ *Johnson v. Branch*, 11 Humph. (Tenn.) 521; *Massmann v. Holscher*, 49 Mo. 87. So, if he makes the performance impossible by his own act. *Stockwell v. Gidney*, 73 Me. 84.

¹⁴⁸ *Ryle v. Harrington*, 14 How. Prac. (N. Y.) 59.

¹⁴⁹ *Greer v. Bentley* (Ky.) 43 S. W. 219.

Fraudulent Diversion—Accommodation Paper.

§ 1803. Where accommodation paper is fraudulently diverted from the purpose for which it is given, it will amount to a defense.¹⁵⁰ So, where one signs as indorser or surety on condition of other signatures which are not procured.¹⁵¹

So, if an accommodation indorsement is given to enable the maker to raise money at the bank, and he exchanges it before maturity for lottery tickets at an exorbitant price, the party so taking it cannot recover against the indorser.¹⁵² So, where a surety signs a note to enable the principal to take up certain other notes and discharge a collateral mortgage, and all of the notes are not taken up, and the mortgage is not discharged, the surety will not be liable.¹⁵⁴ So, if an accommodation acceptance is given to enable the drawer to secure A. for goods purchased, and the acceptance is retained by A. after the goods are paid for, as collateral for another debt of the drawer, and is afterwards transferred to a bona fide holder, who recovers against the acceptor, the latter may recover from the drawer the amount so paid.¹⁵⁵

But, if the purpose of the accommodation is substantially effected, a diversion of the paper from the precise use contemplated will be immaterial.¹⁵⁶ And one who gives an unrestricted accommodation indorsement cannot defend on the ground that the proceeds have not been applied as agreed.¹⁵⁷ So, if an accommodation note is given

¹⁵⁰ *Quebec Bank of Toronto v. Hellman*, 110 U. S. 178, 4 Sup. Ct. 76; *Faulkner v. White*, 33 Neb. 199, 49 N. W. 1122. Without proof of special damage. *Rochester v. Taylor*, 23 Barb. (N. Y.) 18.

¹⁵¹ *Twenty-Sixth Ward Bank v. Stearns*, 148 N. Y. 515, 42 N. E. 1050; *Jordan v. Jordan*, 10 Lea (Tenn.) 124.

¹⁵² *Brown v. Taber*, 5 Wend. (N. Y.) 566.

¹⁵⁴ *Johnston v. May*, 76 Ind. 293. And see §§ 916, 917, *supra*.

¹⁵⁵ *Bleaden v. Charles*, 7 Bing. 246. As to recovery by bona fide holder, see § 1894, *infra*.

¹⁵⁶ *Wardell v. Howell*, 9 Wend. (N. Y.) 170; *Rogers v. Siple*, 35 N. J. Law, 86. But where the maker signs a note to A., to be indorsed by him and delivered for B.'s accommodation on receipt of certain securities from B., and A. pays B.'s debt and retains the note, but surrenders the securities, he cannot hold the maker. *Boutelle v. Wheaton*, 13 Pick. (Mass.) 490.

¹⁵⁷ *Brooks v. Hey*, 23 Hun (N. Y.) 372; *Grandin v. Le Roy*, 2 Paige (N. Y.) 509; *Mohawk Bank v. Corey*, 1 Hill (N. Y.) 513.

to raise money, and it is used by the party accommodated as collateral for,¹⁵⁸ or in payment of,¹⁵⁹ an existing debt, it will not amount to a fraudulent diversion. And if the party accommodated sells the note, instead of having it discounted at a bank as agreed, the surety will not be discharged, and may, therefore, recover contribution from his co-surety, on paying the note.¹⁶⁰ So, if a note is given to A. to raise money to pay off a mortgage on his property held by B., and it is transferred instead to B., after maturity, the defendant must show himself to have been injured by the diversion.¹⁶¹ So, one who gives his accommodation acceptance to the drawer to pay off a debt to A. cannot set up that it was transferred to A. in payment of such debt and other advances.¹⁶² So, the accommodation maker of a note will be liable on it to a bank making advances on the note as collateral, although the note was made to be discounted by the bank.¹⁶³

Diversion to Other Payee.

§ 1804. In general, where accommodation paper is made to be negotiated to a party named in it, and is actually negotiated to another party instead, it will constitute no defense;¹⁶⁴ especially where the accommodation maker has delivered it to his co-maker, and it is delivered by him to such other party.¹⁶⁵ So, where the nominal payee, on refusing to discount the paper, has indorsed it

¹⁵⁸ *Bank of Rutland v. Buck*, 5 Wend. (N. Y.) 66; *Duncan v. Gilbert*, 29 N. J. Law, 521; *Jackson v. Bank*, 42 N. J. Law, 177.

¹⁵⁹ *Wheeler v. Allen*, 59 How. Prac. (N. Y.) 118; *Maitland v. Bank*, 40 Md. 540; *Fetters v. Bank*, 34 Ind. 251.

¹⁶⁰ *Briggs v. Boyd*, 37 Vt. 534.

¹⁶¹ *Corblitt v. Miller*, 43 Barb. (N. Y.) 305. But see, contra, *Thomas v. Watkins*, 16 Wis. 549. And see § 222, *supra*.

¹⁶² *Leach v. Lewis*, 1 MacArthur, 112.

¹⁶³ *Proctor v. Whitcomb*, 137 Mass. 303.

¹⁶⁴ *Réed v. Trentman*, 53 Ind. 438; *Ward v. Bank*, 14 B. Mon. (Ky.) 351; *Browning v. Fountain*, 1 Duv. (Ky.) 13; *Whitaker v. Crutcher*, 5 Bush (Ky.) 621; *Hunt v. Aldrich*, 27 N. H. 31; *Commercial Bank v. Claiborne*, 5 How. (Miss.) 301; *Bank of Newbury v. Richards*, 35 Vt. 281. Where the accommodation party is not prejudiced. *Duncan v. Gilbert*, 29 N. J. Law, 521. And see §§ 917, 1655, *supra*.

¹⁶⁵ *Wardell v. Hughes*, 3 Wend. (N. Y.) 418.

and delivered it to another party, who discounted it;¹⁶⁶ and, if such party afterwards transfers it to a bona fide holder, he will not be liable on that account to the accommodation indorser.¹⁶⁷

But, as against the payee, the diversion of accommodation paper has been held to be equivalent to a failure of consideration.¹⁶⁸ And where the nominal payee refuses to discount the paper, and it is discounted by another for one of the makers, his accommodation co-makers have been held not to be liable.¹⁶⁹ So, a surety has been held not to be liable where the note is discounted by another person, instead of the payee named.¹⁷⁰ If B. gives his accommodation indorsement to obtain a discount and apply the proceeds to the maker's debt to the payee, for which A. is surety, and, on the payee's refusal to discount the note, it is delivered to A., it has been held that he cannot bring suit against the accommodation indorser.¹⁷¹ And an accommodation indorser is not liable where his indorsement was given on the express condition that it should be returned to him, if a particular bank refused to discount it,¹⁷² or where it was agreed that certain mortgage security should be given to him, which was not done, and the note was delivered to another party than the payee, who advanced money on it to the principal debtor.¹⁷³ So, where a note is given by A. to B., to be discounted at a certain bank on certain terms, which are refused, the maker will not be liable on it, either to the payee, or to an indorsee suing in his name.¹⁷⁴

Duress.

§ 1805. Where a bill or note is obtained by duress, it is, in like manner, of no effect between the original parties.¹⁷⁵ Thus, a note

¹⁶⁶ *Morris v. Morton*, 14 Neb. 358, 15 N. W. 725; *Dunn v. Weston*, 71 Me. 270; *Cross v. Rowe*, 22 N. H. 77.

¹⁶⁷ *Dawson v. Goodyear*, 43 Conn. 548.

¹⁶⁸ *Simpson Centenary College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74.

¹⁶⁹ *Adams Bank v. Jones*, 16 Pick. (Mass.) 574.

¹⁷⁰ *Granite Bank v. Ellis*, 43 Me. 367.

¹⁷¹ *Kasson v. Smith*, 8 Wend. (N. Y.) 437. And see § 980, *supra*.

¹⁷² *Hickerson v. Raiguel*, 2 Helsk. (Tenn.) 329.

¹⁷³ *Howe v. Selby*, 53 Iowa, 670, 6 N. W. 39.

¹⁷⁴ *Denniston v. Bacon*, 10 Johns. (N. Y.) 198.

¹⁷⁵ *Chit. Bills*, 85; *Duncan v. Scott*, 1 Camp. 100; *Stevens v. Underwood*.

is void if it is procured by abuse of criminal process,¹⁷⁶ or obtained by means of a pretended warrant executed by a pretended officer,¹⁷⁷ or if it is given under duress of imprisonment in order to regain possession of property unlawfully withheld from the maker,¹⁷⁸ or is procured by unlawful refusal to allow the maker's vessel to leave port until he had signed a bill for the debt.¹⁷⁹ So, a fraudulent threat of an attachment without justifiable ground,¹⁸⁰ or a threat of personal violence,¹⁸¹ amounts to duress. So, if a note is obtained and collected by military force, the maker may recover the amount paid.¹⁸² But a note given for a debt of the maker to procure his discharge from prison is not given under duress.¹⁸³ And it is not duress to threaten lawful bankruptcy proceedings,¹⁸⁴ or to say that the maker could not leave the state, as he was about to do, until he

6 Scott, 402; *Hatch v. Barrett*, 34 Kan. 223, 8 Pac. 129; *Magoon v. Reber*, 76 Wis. 392, 45 N. W. 112.

¹⁷⁶ *Shenk v. Phelps*, 6 Ill. App. 612; *Phelps v. Zuschlag*, 34 Tex. 371. And see §§ 501, 502, *supra*. So, threats of criminal prosecution of the brother, to procure a note from the sister. *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946. But not so a note for money embezzled with threat of criminal prosecution. *Beath v. Chapoton* (Mich.) 73 N. W. 806; *Wolf v. Troxell's Estate*, 94 Mich. 573, 54 N. W. 383.

¹⁷⁷ *Coffelt v. Wise*, 62 Ind. 451.

¹⁷⁸ *Bennett v. Ford*, 47 Ind. 264.

¹⁷⁹ *McPherson v. Cox*, 86 N. Y. 472.

¹⁸⁰ *Downing v. Ely*, 125 Mass. 369.

¹⁸¹ *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560. So, where the note was given in settlement of a crim. con. proceeding, which occasioned the threat. *McGowen v. Bush*, 17 Tex. 195. But not so a note obtained by threat of personal violence to a third person, then at a distant place. *Barrett v. Mahnken* (Wyo.) 48 Pac. 202.

¹⁸² *Volers v. Stout*, 4 Bush (Ky.) 572. So, where the holder of a note is compelled by military arrest to surrender it on receipt of Confederate currency offered in payment. *Anderson v. Lewis*, 31 Tex. 675. But saying he "must take it," without any threats, is not duress, although the Confederate army was near, and military orders required marshals to arrest persons refusing to take such currency, and some had been arrested. *Davis v. Railroad Co.*, 46 Miss. 552.

¹⁸³ *Bates v. Butler*, 46 Me. 387; *St. Albans Bank v. Dillon*, 30 Vt. 122; *Kelley v. Noyes*, 43 N. H. 209. And see § 500, *supra*.

¹⁸⁴ *Benner v. Van Norden*, 27 La. Ann. 473.

signed the note.¹⁸⁸ And a threat of suicide by a husband is not duress upon the wife.¹⁸⁹

Fraud in Inception.

§ 1806. The fraud that renders a bill or note void may be either in its inception or in its subsequent transfer. If the paper is originally obtained by fraud, or for a fraudulent consideration, it will be a legal defense.¹⁸⁷ Thus, it will be void if given for a pretended sale of goods.¹⁸⁸ So, if a signature is written on a blank sheet for future use as an address, and a note is afterwards fraudulently written over it, it will not be binding on the pretended maker,¹⁸⁹ even in the hands of a bona fide holder.¹⁹⁰ If a note is given in escrow for a certain bond to be delivered, and the payee obtains it by fraudulently substituting another bond, he cannot recover on it.¹⁹¹ So, where one agrees to become a surety on a note in payment for certain purchases, and another debt is fraudulently inserted in the note, it will be voidable as to the amount so added.¹⁹² But it is no defense that the holder bought certain notes, and commenced several actions on them, with a design to harass and oppress the maker.¹⁹³

It is not of itself a fraud that the maker was insolvent at the time, if the note was given in good faith for a valid debt.¹⁹⁴ And even

¹⁸⁸ *Seymour v. Prescott*, 69 Me. 376.

¹⁸⁹ *Remington v. Wright*, 43 N. J. Law, 451, affirming 41 N. J. Law, 49.

¹⁸⁷ *Galusha v. Bank*, 1 Hun (N. Y.) 573. E. g. by false entries making the defendant appear to be indebted to the plaintiff. *Barber v. Kerr*, 3 Barb. (N. Y.) 149. Or by misrepresentation of the payee's identity. *Bergmann v. Salmon*, 79 Hun, 456, 29 N. Y. Supp. 968. Or by fraudulent reissue of bonds that have been paid. *Board of Education v. Sinton*, 41 Ohio St. 504. As to fraud in consideration, see §§ 489, 549, supra. And by fraudulent warranty, see § 548, supra.

¹⁸⁸ *Nichols v. Baker*, 75 Me. 334. Or for a genuine sale which the purchaser did not intend to pay for. *Nichols v. Baker*, 75 Me. 334. And the defense is available without an offer to rescind the note if the damages equal the whole face of the note. *Kelly v. Pember*, 35 Vt. 183.

¹⁸⁹ *Willson v. Miller*, 72 Ill. 616.

¹⁹⁰ *Nance v. Lary*, 5 Ala. 370.

¹⁹¹ *Boone v. Queen*, 2 Cranch, C. C. 371, Fed. Cas. No. 1,643.

¹⁹² *Clopton v. Elkin*, 49 Miss. 95.

¹⁹³ *Bragg v. Raymond*, 11 Cush. (Mass.) 274.

¹⁹⁴ *Savage v. Ball*, 17 N. J. Eq. 142.

where the officers of a bank, knowing it to be insolvent, receive deposits from persons ignorant of its condition, charging and remitting such deposits at customary intervals, irrespective of their collection, the bank will not be liable for uncollected drafts as a special deposit, and they cannot be recovered as such against its receiver.¹⁹⁵ But it has been held to be a fraud for an insolvent bank to receive checks deposited, when contemplating immediate suspension and insolvency.¹⁹⁶ But one who purchases a bill in good faith from a branch bank, after the principal bank had failed without his knowledge, can only prove as a general creditor against such bank, and cannot recover the payment made by him as on a void sale.¹⁹⁷

Fraud in Transfer.

§ 1807. Fraud in the sale of collateral and in the application of the proceeds is admissible as a defense.¹⁹⁸ So, if the payee misappropriates a note given as a renewal to take up another note, which the maker is afterwards obliged to pay, he may set up the defense against the payee.¹⁹⁹ So, if paper is fraudulently disposed of by one with whom it was deposited for safe-keeping, it is a good defense against a party with notice.²⁰⁰ But, if the maker of a note puts it into the hands of an agent to sell and raise money on it, he cannot set up against a bona fide holder a misappropriation of the proceeds by the agent.²⁰¹ And, in general, the maker is not discharged by the mere fact that the note was fraudulently transferred by the payee.²⁰²

¹⁹⁵ *People's Bank v. Frelinghuysen*, 8 N. J. Law J. 295. On the other hand, the receiver of an insolvent bank cannot appropriate (as the proceeds of its own drafts, under the national bank act) a special deposit of drafts purchased of a depositor whose account was overdrawn, although the cashier acted as agent of the seller and purchased as executor. *Tuttle v. Frelinghuysen*, 38 N. J. Eq. 12.

¹⁹⁶ *Fisse v. Dietrich*, 3 Mo. App. 584. And see § 1810, *infra*.

¹⁹⁷ *In re Oriental Bank*, 28 Ch. Div. 643.

¹⁹⁸ *Howard v. Ames*, 3 Metc. (Mass.) 308.

¹⁹⁹ *Honeycut v. Strother*, 2 Ala. 135.

²⁰⁰ *Marston v. Allen*, 8 Mees. & W. 494.

²⁰¹ *Lingg v. Blummer*, 88 Pa. St. 518.

²⁰² *Kinney v. Kruse*, 28 Wis. 183. And see §§ 694, 800, *supra*.

On the other hand, if a bill is indorsed for a certain purpose to A., he cannot appropriate it to a debt due him from the indorser, and hold the acceptor liable upon it.²⁰³ And if an agent, to whom a note is given to procure a discount, misappropriates it to a debt due himself, he will be liable to the principal, as though he had procured the discount.²⁰⁴ And where one makes a note and delivers it to B., and it is given by him to another party to get it discounted and pay the proceeds to B.'s creditor, A., for whose benefit it was originally made, and he diverts it to another purpose, and the maker is afterwards obliged to take it up, he may recover in trover for breach of trust against the party to whom it was originally delivered, although the note has been returned to his possession.²⁰⁵

Fraud on Other Party.

§ 1808. It is no defense for the maker of a note to show that the indorsement was procured by fraud on the indorser,²⁰⁶ even against a party who had notice of such fraud.²⁰⁷ But, where the drawer of a check proves that it has been obtained by fraud upon the indorser, the burden is thrown on the holder to show that he got it in good faith and for value.²⁰⁸ In like manner, an indorser cannot set up that the note was obtained from the maker by duress.²⁰⁹ But one who has indorsed a note for the maker's accommodation, without notice of fraud, may set up duress on the maker's part as against a payee with notice.²¹⁰ Where a firm note is given for a partner's debt, in fraud of another partner, and its execution in the firm name is relied on by a surety who signs it afterwards, the surety will not

²⁰³ *Delauney v. Mitchell*, 1 Starkie, 439.

²⁰⁴ *Oughton v. West*, 2 Starkie, 321.

²⁰⁵ *Murray v. Burling*, 10 Johns. (N. Y.) 172.

²⁰⁶ *Carrier v. Sears*, 4 Allen (Mass.) 336; *Combes v. Chandler*, 33 Ohio St. 178.

²⁰⁷ *Prouty v. Roberts*, 6 Cush. (Mass.) 19.

²⁰⁸ *Merchants' Exch. Nat. Bank v. New Brunswick Sav. Inst.*, 33 N. J. Law, 170.

²⁰⁹ *Bowman v. Hiller*, 130 Mass. 153. Or fraud upon the maker. *Watson v. Chesire*, 18 Iowa, 202. And see § 756, *supra*.

²¹⁰ *Griffith v. Sitgreaves*, 90 Pa. St. 161.

be discharged.²¹¹ So, a guarantor may set up that the note was obtained from his principal by fraud.²¹²

The acceptor, who pays a bill and brings suit against the drawers, cannot be defeated by the fraud of one drawer upon the other.²¹³ So, the maker of a note cannot set up in his own defense a fraud practiced by the indorser upon his creditors, although the maker is one of them.²¹⁴ And the maker cannot set up, even against a holder with notice, that the note was made with fraudulent intent on the part of the maker and payee to defeat the payee's creditors.²¹⁵

Fraud by Other Party.

§ 1809. Where the signature of one of the makers is obtained under a promise to release him after a certain estate is settled, he will still be liable on the note, and the concealment of such arrangement will therefore not render the note invalid.²¹⁶ So, the acceptor of a bill cannot set up against the payee a fraud on the drawer's part.²¹⁷ Neither can one maker set up against the payee a fraud practiced upon him by his co-maker,²¹⁸ the payee having no knowledge of such fraud.²¹⁹ So, a maker who signs for the payee's accommodation can-

²¹¹ *Hagar v. Mounts*, 3 Blackf. (Ind.) 57, 261. But the purchaser under a foreclosure cannot set up the duress of the mortgagor. *West v. Miller*, 125 Ind. 70, 25 N. E. 143. So, a surety signing with notice of the duress of his principal cannot set it up in his own defense. *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931. And see § 918, supra. But the defrauded partner may set up such defense. *Lerch Hardware Co. v. First Nat. Bank* (Pa. Sup.) 5 Atl. 778.

²¹² *Putnam v. Schuyler*, 4 Hun (N. Y.) 166.

²¹³ *Kimbrow v. Bullitt*, 22 How. 256.

²¹⁴ *Wood v. Steele*, 65 Ala. 436. So, though the note was obtained by the payee to be transferred to his creditors on their agreement to release him and discharge his bill, the maker not being privy to such agreement. *Mack v. Clark*, 1 Metc. (Mass.) 423.

²¹⁵ *Winton v. Freeman*, 102 Pa. St. 366.

²¹⁶ *State v. Overturf*, 16 Ind. 261.

²¹⁷ *Gray v. Bank*, 29 Pa. St. 365. But see, contra, *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. 180.

²¹⁸ *Fulford v. Block*, 8 Ill. App. 284. So, the principal maker cannot set up the fraud of the surety as against the payee. *First Nat. Bank of Chelsea v. Fitts*, 67 Vt. 57, 30 Atl. 697.

²¹⁹ *Vass v. Riddick*, 89 N. C. 6. Especially if he is estopped by his own negligence. *Anderson v. Warne*, 71 Ill. 20.

not set up against an indorser, who signed in the same way, that his signature was obtained by the payee by fraud.²²⁰ And, where a bank gives its note for money borrowed, the subsequent misapplication of the proceeds by its officers will not relieve it from liability.²²¹ And, in general, it is no defense that the defendant's signature was obtained by threats of a third person, which are not chargeable to the payee.²²² On the other hand, a fraudulent agreement between one of the makers and the payee will relieve the other maker from liability to the payee.²²³ And the maker may set up the fraud of the payee's agent in an action brought by him, although the payee had no knowledge of it.²²⁴

Rescission for Fraud—Recovery.

§ 1810. A contract may be rescinded for fraud within a reasonable time after its discovery.²²⁵ And, if a note is given for goods purchased, the vendor may rescind the contract for fraud, and bring an action of trover for the goods, without previous notice of nonpayment of the note;²²⁶ or without a previous surrender of the note, which may be held as evidence of the transaction;²²⁷ it being sufficient, if the note is offered for surrender at the time of the trial.²²⁸ Fraud may be set up as a defense at law to a bill or note.²²⁹ So, if one is induced to pay a note by false representation that he had signed it as surety, he may recover the payment made.²³⁰ And if one in good faith deposits drafts for collection in a bank which is known by its

²²⁰ *Laubach v. Pursell*, 35 N. J. Law, 434.

²²¹ *Donnell v. Bank*, 80 Mo. 165. And see § 392, *supra*.

²²² *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596.

²²³ *Mitchell v. Donahey*, 62 Iowa, 376, 17 N. W. 641. And see § 424, *supra*.

²²⁴ *Aultman v. Olson*, 34 Minn. 450, 26 N. W. 451; *Tagg v. Bank*, 9 Heisk. (Tenn.) 479.

²²⁵ *Cummings v. Henry*, 10 Ind. 109; *Higgins v. Hayden* (Neb.) 73 N. W. 280. But mere countermand of payment is not a rescission. *Ex parte Jones*, 77 Ala. 330.

²²⁶ *Alexander v. Dennis*, 9 Port. (Ala.) 174.

²²⁷ *Dayton v. Monroe*, 47 Mich. 193, 10 N. W. 196.

²²⁸ *Nichols v. Michael*, 23 N. Y. 264.

²²⁹ *Penn Mut. Life Ins. Co. v. Crane*, 134 Mass. 56; *Willson v. Cromwell*, 1 Cranch, C. C. 214, Fed. Cas. No. 17,799; *Terry v. Taylor*, 64 Iowa, 35, 19 N. W. 841.

²³⁰ *Lewellen v. Garrett*, 58 Ind. 442.

officers to be insolvent, it will amount to a fraud on the part of the bank, and entitle the depositor to recover as on a special deposit.²³¹ But an indorser cannot bring an action for deceit in obtaining his indorsement until he has paid the note.²³² Where the maker of a note is induced to sign it by false representations, the fraud is admissible as a counterclaim in an action brought on the note.²³³ But it has been held that he cannot recover the note itself in an action of replevin.²³⁴

Equitable Relief.

§ 1811. A court of equity has jurisdiction in the case of fraud, and may order the bill to be delivered up²³⁵ or canceled.²³⁶ It may also enjoin the collection of a note on account of the holder's fraud in procuring the indorsement.²³⁷ And where a note is obtained by the fraud of A., and the proceeds of it are deposited in his wife's name, and used by her, an action will lie in equity against husband and wife, although assumpsit could not be maintained against the latter.²³⁸ But an injunction will not be granted against the collection of a note on the ground of fraud upon the maker, if it is in the hands of a bona fide holder for value before maturity.²³⁹ If a note given in settlement of an account is found to contain items of fraudulent overcharge, the legal remedy on the ground of fraud is, in

²³¹ *Cragle v. Hadley*, 99 N. Y. 131, 1 N. E. 537. So, *Balbach v. Frelinghuysen*, 15 Fed. 675, 6 N. J. Law J. 105, Nixon, J.

²³² *Freeman v. Venner*, 120 Mass. 424. But, where the maker has paid the note to a bona fide holder, he may recover from the payee and indorser by whose fraud he was induced to execute it. *Mitchell v. Finnell*, 101 Cal. 614, 36 Pac. 123.

²³³ *Norris v. Tharp*, 65 Ind. 47.

²³⁴ *Olson v. Thompson* (Okla.) 52 Pac. 388.

²³⁵ *Allen v. Davis*, 4 De Gex & S. 133; *Campbell v. Lynch*, 6 W. Va. 17. But in Ohio such action must be brought within four years after discovery of the fraud. *Loffland v. Bush*, 26 Ohio St. 559.

²³⁶ *Hicks v. Stephens*, 15 Ill. App. 480; *Platt v. Snipes*, 43 Ark. 21; *Magoon v. Reber*, 76 Wis. 392, 45 N. W. 112. But he cannot retain the consideration in such case. *City Nat. Bank of Dayton v. Kusworm*, 91 Wis. 166, 64 N. W. 843; *Id.*, 88 Wis. 188, 59 N. W. 564.

²³⁷ *Deaderick v. Mitchell*, 6 Baxt. (Tenn.) 35.

²³⁸ *Wilson v. Scott*, 3 Lans. (N. Y.) 308.

²³⁹ *Dougherty v. Scudder*, 17 N. J. Eq. 248.

general, sufficient; and, if so, recourse cannot be had to a court of equity.²⁴⁰

Fraud Waived.

§ 1812. Where a note is signed by a surety for the accommodation of the maker, and is diverted by him, if the surety afterwards promises to pay it he cannot set up the diversion as a defense.²⁴¹ So, fraud in an original claim is, in general, waived by giving a note in settlement,²⁴² or by a subsequent promise to pay it in consideration of time given.²⁴³ So, where an accommodation maker declares himself liable with the indorser in a proceeding in bankruptcy against the latter, he cannot afterwards disclaim his liability, and show that he had surrendered collateral on the supposition that he was not liable.²⁴⁴ So, if a note is given for property purchased, and an action is afterwards brought on the contract, with knowledge of the fraud, but without rescinding the contract, and making rescission impossible, it will be a waiver of defense to the note on that ground.²⁴⁵ So, if a note is obtained by fraud, and the holder takes judgment on the note after discovering the fraud, it will be a waiver of his right to rescind, or to sue on the original contract.²⁴⁶ And, where a note is given for the purchase of property, its retention will be an affirmation of the contract, and a waiver of the right to have it rescinded.²⁴⁷ But, to constitute a waiver of fraud, the conduct of the party must amount to a reissue of the note, or an estoppel.²⁴⁸ And, if a note is

²⁴⁰ Dickinson v. Lewis, 34 Ala. 638.

²⁴¹ Mastin Bank v. Hammerslough, 72 Mo. 274.

²⁴² Feeter v. Weber, 78 N. Y. 334. But a mere renewal does not purge fraud. Merchants' Nat. Bank v. Tracy, 77 Hun, 443, 29 N. Y. Supp. 77. And in Ryle v. Brown, 50 N. Y. Super. Ct. 174, it was held that damages for the original fraud might be recovered, notwithstanding the note subsequently given.

²⁴³ Doherty v. Bell, 55 Ind. 205; Rindskopf v. Doman, 28 Ohio St. 516. And a fresh consideration is not necessary. Lyon v. Phillips, 106 Pa. St. 57. But see, contra, First Nat. Bank of Decorah v. Holan, 63 Minn. 525, 65 N. W. 952.

²⁴⁴ Draper v. Halloran, 107 Mass. 380.

²⁴⁵ Downer v. Smith, 32 Vt. 1. So, where the maker had made a part payment and the payee had sued the maker for deceit in the compromise for which the note was given. Dodge v. Manchester, 58 Ind. 429.

²⁴⁶ Ricker v. Adams, 59 Vt. 154, 8 Atl. 278.

²⁴⁷ Harrington v. Lee, 33 Vt. 249.

²⁴⁸ Wurster v. Reitzinger, 5 Ill. App. 112.

void as against public policy (e. g. for abuse of criminal process), the illegality cannot be waived.²⁴⁹ A promise of payment, without knowledge of the circumstances, will not be a waiver.²⁵⁰ On the other hand, a delay after the discovery of the forgery of a deed for which the note was given, pending an action brought to recover the land, and unsuccessfully defended, will not bar a defense to the note on a suit brought for its rescission.²⁵¹ In Pennsylvania, the words "without defalcation" will not prevent the maker from setting up that the note was obtained by fraud.²⁵² But the payee of a note given for insurance premiums may be defeated by misrepresentations made by his agent as to the members of the board of directors, although he had given a receipt for the note providing for repayment in case it was not binding.²⁵³

Fraud—How Pleaded.

§ 1813. Where a bill or note has been obtained by fraudulent representations, the fact must be specially pleaded.²⁵⁴ So, the fact that a stamp was fraudulently omitted.²⁵⁵ But the pleading need not state the particular facts which constitute the fraud.²⁵⁶ Under a plea of payment the defendant cannot set up that he was fraudulently prevented from bidding at the foreclosure sale of a collateral mortgage.²⁵⁷ So, under a plea denying an indorsement, he cannot set up

²⁴⁹ *Shenk v. Phelps*, 6 Ill. App. 612.

²⁵⁰ *Mackay v. Holland*, 4 Metc. (Mass.) 69.

²⁵¹ *Nealon v. Henry*, 131 Mass. 153.

²⁵² *Commercial & Farmers' Bank v. Patterson*, 2 Cranch, C. C. 346, Fed. Cas. No. 3,056.

²⁵³ *Penn Mut. Life Ins. Co. v. Crane*, 134 Mass. 56. So, if payment is made in good faith by the indorsee through fraud of the payee and indorsee, it will estop the payee from recovering against the maker. *Alexander v. Rollins*, 14 Mo. App. 109.

²⁵⁴ *Miller v. Finley*, 26 Mich. 249. And it can only be proved on notice to the plaintiff. *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 25. In Maryland it has been held necessary to deny in such pleas that the plaintiff is a bona fide holder. *Banks v. McCosker*, 82 Md. 518, 34 Atl. 539. But not so in Indiana. *First Nat. Bank of Huntington v. Ruhl*, 122 Ind. 279, 23 N. E. 766.

²⁵⁵ *Campbell v. Wilcox*, 10 Wall. 421.

²⁵⁶ *McClintick v. Johnston*, 1 McLean, 414, Fed. Cas. No. 8,700. And see *Woollen v. Whitacre*, 73 Ind. 198; *Woollen v. Wise*, Id. 212.

²⁵⁷ *Torrey v. Fenton*, 130 Mass. 329.

that it was fraudulently diverted.²⁵⁸ But, when the defendant sets up in his plea the release of a note, the plaintiff may show that the release was obtained by fraud, without a special replication.²⁵⁹

Fraud—How Proved.

§ 1814. The burden of proving the fraud is on the party averring it.²⁶⁰ And fraud will not necessarily be presumed because the note is larger in amount than the debt for which it was given.²⁶¹ Whether the circumstances amount to fraud is a question for the jury.²⁶² And parol evidence is admissible to show the facts constituting the alleged fraud,²⁶³ and even, it has been held, to show other similar transactions.²⁶⁴ So, prior conversations have been admitted as evidence of fraud,²⁶⁵ as well as the admissions of a deceased maker to the effect that the note was made for a different purpose.²⁶⁶

The availability of the above defenses and others, as affected by matter of estoppel on the defendant's part, or by the character of the plaintiff as a bona fide purchaser for value before maturity, will be considered in a later chapter.

²⁵⁸ *Hayes v. Caulfield*, 5 Q. B. 81.

²⁵⁹ *Lyon v. Manning*, 133 Mass. 439.

²⁶⁰ *Ecton v. Harlan*, 20 Kan. 452. Although the purchaser knew the note was given for a patent right. *Miller v. Finley*, 26 Mich. 249. So, where he alleges fraud in the application of a collateral mortgage. *Wadsworth v. Glynn*, 131 Mass. 220.

²⁶¹ *Hughes v. Shull*, 33 Kan. 127, 5 Pac. 414.

²⁶² *Earl of Bristol v. Wilsmore*, 1 Barn. & C. 514, 2 Dowl. & R. 755.

²⁶³ *Lime Rock Bank v. Hewett*, 50 Me. 267; *Kirkham v. Boston*, 67 Ill. 509; *Hartman v. Shaffer*, 71 Pa. St. 312.

²⁶⁴ *Nichols v. Baker*, 75 Me. 334.

²⁶⁵ *Van Buskirk v. Day*, 32 Ill. 260.

²⁶⁶ *Overton v. Hardin*, 6 Cold. (Tenn.) 375.

CHAPTER XLVI**SATISFACTION, RELEASE, AND SET-OFF.****I. SATISFACTION AND DISCHARGE.****II. RELEASE AND SET-OFF.**

I. SATISFACTION AND DISCHARGE.

- § 1815. Change of Contract.
- 1817. Extension—Its Effect.
- 1818. — Undisclosed Sureties.
- 1819. — Sufficient.
- 1820. — Not Sufficient.
- 1822. — Consideration.
- 1823. Satisfaction—What is.
- 1824. Satisfaction by Payment.
- 1825. — By Bill or Note.
- 1826. — By Other Security.
- 1827. — By Services—Merchandise.
- 1828. Merger in Judgment.
- 1829. — Against Prior Parties.
- 1830. — Against Joint Debtors.
- 1831. Discharge by Execution.
- 1832. Extinguishment by Marriage—Death.
- 1833. Bankruptcy—Discharge.
- 1834. — Composition.

Change of Contract.

§ 1815. Defenses of the third class include such as modify the original contract by a new agreement or extension, or discharge it by satisfaction, release, or set-off. An agreement made between the holder of a note secured by mortgage, and the holder of another and prior mortgage, providing for the cancellation of the latter, constitutes an intermediate equity, and is not such a modification of the original contract as can be set up against a subsequent holder.¹ So, where the debt of the principal maker is assumed by the surety, who gives

¹ Crosby v. Tanner, 40 Iowa, 136.

in renewal his note as maker, with the original maker as indorser, the latter cannot set up his agreement with the original surety as against a holder who was not a party to the old note or the original consideration.²

And the maker cannot set up the insufficiency of the consideration received by the payee upon his transfer and not questioned by him.³ But an acceptor who sets up the want of consideration, as against a third indorsee, must prove want of consideration not only between himself and the drawer, but also between the drawer and his subsequent indorsee.⁴ Where the consideration to the drawer fails, and he notifies the acceptor not to pay the bill, the acceptor may call him in to defend.⁵ An indorser, in like manner, cannot set up the want of consideration between the drawer and acceptor.⁶ But, upon interrogatories in equity, the defendant may not only be required to answer as to the consideration received by him, but also as to that received by other parties, to the extent of his knowledge.⁷

An indorser may set up, against his indorsee, the nonperformance of an agreement between the indorsee and the maker to deposit collateral for the indorser's security.⁸ And a maker may set up a subsequent agreement, made by him with the plaintiff, that the note should be paid out of the profits of a certain business;⁹ or a contemporaneous writing to the effect that the note should not be paid until the happening of a certain event.¹⁰

² *Dougherty v. Mackenzie's Adm'x*, 34 Mo. 462.

³ *Forestville Baptist Soc. v. Farnham*, 15 Hun (N. Y.) 381. And see § 445, *supra*.

⁴ *Whittaker v. Edmunds*, 1 Moody & R. 366, 1 Adol. & E. 638.

⁵ *Gilman v. Pillsbury*, 16 La. Ann. 51.

⁶ *Robinson v. Reynolds*, 2 Q. B. 196.

⁷ *Glengall v. Edwards*, 2 Younge & C. Exch. 125; *Culverhouse v. Alexander*, Id. 218.

⁸ *Baumgardner v. Reeves*, 35 Pa. St. 250. But he cannot set up as satisfaction a deposit of collateral by another party to indemnify the accommodation maker. *Dougherty v. Mackenzie's Adm'x*, 34 Mo. 462.

⁹ *Gleason v. Saunders*, 121 Mass. 436. But a contemporaneous agreement, accompanying a note for the purchase of land, that the profits should be divided, cannot be set up in defense. *Costelo v. Crowell*, 134 Mass. 280.

¹⁰ *Webb v. Spicer*, 13 Q. B. 886. But this does not include written rules of a loan society, not made part of the note. *Brown v. Langley*, 4 Man. & G. 466. Nor an insurance policy, although the note was made expressly for (2550)

§ 1816. But the maker cannot set up an agreement between his father and the payee for forbearance, or for a transfer of the note;¹¹ or an agreement to give time on the note;¹² or an agreement that the judgment should be discharged "when notes to be agreed upon are given," such notes not having been given;¹³ or an agreement on the part of the payee's agent to pay the maker for time lost in waiting for the consideration of the note.¹⁴ And where a bond and mortgage are given in payment of a debt, with a note as collateral, under an agreement not to use the note for a year, and to return either the note or the bond and mortgage within a time fixed, the fact that the holder returned the bond and mortgage, and transferred the note within the year, contrary to agreement, will not be a defense to the note.¹⁵ So, the maker cannot set up an agreement with the payee for a novation of the debt, by which the purchaser of land securing it was to take up the note and give another, although performed on the part of the maker and the purchaser of the land.¹⁶ So, an accommodation joint maker cannot set up an agreement on the holder's part to look to the co-maker who was accommodated.¹⁷ And an indorser cannot set up an agreement on the holder's part to first sue the maker and exhaust collateral given by him.¹⁸ But an accommodation indorser may set up the payee's agreement to protect him out of certain funds in hand due to the maker.¹⁹

The admissibility of parol evidence to show another contract by contemporaneous condition or agreement for extension, satisfaction, or release is considered in other parts of this work.²⁰

Insurance premiums. *American Ins. Co. v. Gallahan*, 75 Ind. 168; *Adams v. Smith*, 35 Me. 324.

¹¹ *Porter v. Pierce*, 22 N. H. 275.

¹² *Garnier v. Papin*, 30 Mo. 243; *Nelson v. White*, 61 Ind. 139. Even though it was made after the note matured, and on fresh consideration. *Newkirk v. Neild*, 19 Ind. 194.

¹³ *Klett v. Claridge*, 31 Pa. St. 106.

¹⁴ *Bunting v. Hellman*, 74 Ind. 344.

¹⁵ *Wood v. Sheehan*, 68 N. Y. 365.

¹⁶ *Kimball v. Grover*, 11 N. H. 375.

¹⁷ Although made after maturity. *Harris v. Brooks*, 21 Pick. (Mass.) 195.

¹⁸ *Planters' Bank of Ft. Valley v. Houser*, 57 Ga. 140.

¹⁹ *Hawley v. McCredy*, 54 Cal. 388.

²⁰ See § 1806 et seq., *infra*.

Effect of Extension.

§ 1817. The drawer of a bill is discharged by a valid extension of time given to the acceptor.²¹ In like manner, an extension given to the maker or acceptor discharges the indorser.²² And, if given to the principal debtor, it discharges the surety.²³ But the principal cannot set up an extension of time to the surety.²⁴ So, an extension of time to an accommodation acceptor will not discharge the drawer accommodated by the acceptor.²⁵

Undisclosed Suretyship.

§ 1818. An accommodation maker, who is not known to be such, will not be discharged by an extension to the accommodated payee;²⁶ although the relation between them is that of principal and surety. But, if the accommodation is known to the holder giving the extension, it will discharge the accommodation maker.²⁷ The knowledge on the holder's part must, however, be at the time of purchase; and, if he purchased the note without such knowledge, his subsequent extension to the payee after learning that the note was made for his accommodation will not discharge the maker.²⁸

²¹ *Moss v. Hall*, 5 Exch. 46; *High v. Cox*, 55 Ga. 662.

²² *Gould v. Robson*, 8 East, 576. And see §§ 767, 768, *supra*. So, if a demand note is indorsed for the maker's accommodation to obtain a six-months credit, and the credit is renewed without the indorser's consent. *Smith v. Becket*, 13 East, 187.

²³ *Oakeley v. Pasheller*, 10 Bligh (N. S.) 548; *Parmelee v. Williams*, 72 Ga. 42; *St. Joseph Fire & Marine Ins. Co. v. Hauck*, 71 Mo. 465; *Starret v. Burkhalter*, 86 Ind. 439. And see §§ 926, 954, *et seq.*, *supra*. But the maker of a note secured by his mortgage is not discharged in law by an extension given to a purchaser of the mortgaged premises who had assumed the payment of the note and become in equity the principal debtor, although he may be relieved in equity. *Teeters v. Lamborn*, 43 Ohio St. 144, 1 N. E. 513.

²⁴ *Williams v. Scott*, 83 Ind. 405.

²⁵ *Collott v. Haigh*, 3 Camp. 281.

²⁶ *Pinney v. Kimpton*, 46 Vt. 80.

²⁷ *Taylor v. Burgess*, 5 Hurl. & N. 1; *Bank of Upper Canada v. Ockerman*, 15 U. C. C. P. 363; *Same v. Thomas*, Id 515. But see, *contra*, *Bank of Montgomery Co. v. Walker*, 9 Serg. & R. (Pa.) 229; 12 Serg. & R. (Pa.) 382; *Love v. Brown*, 38 Pa. St. 307.

²⁸ *Hoge v. Lansing*, 35 N. Y. 136.

Where the drawer of a bill is the principal debtor, and the acceptor signed it for his accommodation, the latter will be discharged in equity by an extension given to the former by a party having notice of the accommodation.²⁹ And it has been held that an accommodation acceptor will be discharged at law by an extension granted to the accommodated drawer with knowledge of their relation.³⁰ Where a note is signed by several parties as joint makers, an extension to one will not discharge the others, although they were in reality sureties for him,³¹ where this was not known to the holder;³² or even, it has been held, where it was known.³³ A surety, who is not disclosed as such, will not be discharged at law in such case without an averment that the relation was recognized by agreement to that effect with the holder.³⁴ But such extension, coupled with the holder's knowledge of the relationship of the parties, may be set up at law with such averment as an equitable defense, where it would be admissible as a defense in equity.³⁵

Extension—What is Sufficient.

§ 1819. To constitute a valid extension of time there must be a binding agreement to that effect.³⁶ The time given need not, how-

²⁹ Although such notice was after purchase of the bill, but before the extension. *Davies v. Stainbank*, 6 De Gex, M. & G. 679.

³⁰ *Laxton v. Peat*, 2 Camp. 185. Although the acceptor afterwards deposited title deeds to secure the acceptance, and gave the note in suit in order to obtain them again. *Bristow v. Brown*, 13 Ir. C. L. 201. But the acceptor is not discharged, where the holder expressly reserves his rights against him. *Bank of Upper Canada v. Jardine*, 9 U. C. C. P. 332.

³¹ *Davidson v. Bartlett*, 1 U. C. Q. B. 50; *Nichols v. Parsons*, 6 N. H. 30. And the fact of suretyship will not be presumed. *Mullendore v. Wertz*, 75 Ind. 431.

³² *Fentum v. Pocock*, 5 Taunt. 192; *Harrison v. Courtauld*, 3 Barn. & Adol. 36. And see § 955, *supra*.

³³ *Anthony v. Fritts*, 45 N. J. Law, 1. And see *Pintard v. Davis*, 20 N. J. Law, 205.

³⁴ *Manley v. Boycot*, 2 El. & Bl. 46.

³⁵ *Pooley v. Harradine*, 7 El. & Bl. 430; *Hubbard v. Gurney*, 64 N. Y. 457.

³⁶ *Thompson v. McDonald*, 17 U. C. Q. B. 304. Of a definite and positive character. *Boardman v. Larrabee*, 51 Conn. 39. And see §§ 768, 957, *et seq.*, *supra*.

ever, be long, and the mere addition of days of grace is sufficient.³⁷ Payment of interest in advance raises a presumption of agreement for time so far as the payment extends.³⁸ So, a renewal is an extension of time;³⁹ or an agreement for a renewal, which is applied for within a reasonable time after the maturity of the original note.⁴⁰ So, it is an extension to take a new note payable at a future day;⁴¹ or a mortgage.⁴² So, where a renewal is sent, and the original draft retained by the holder without further action until the maturity of the second draft, the jury may find an agreement on the holder's part to give time until then.⁴³ So, if the holder consents to an order for a stay of proceedings beyond the time necessary for him to obtain judgment, it will amount to an extension.⁴⁴

Extension—What is Not Sufficient.

§ 1820. The time of an extension, however short, must be definitely fixed. An agreement for an indefinite time will not be sufficient.⁴⁵ So, the maker cannot set up a contemporaneous written

³⁷ *Appleton v. Parker*, 15 Gray (Mass.) 173.

³⁸ *Skelly v. Bank*, 63 Conn. 83, 26 Atl. 474; *Armendt v. Perkins* (Ky.) 32 S. W. 270; *Walley v. Bank*, 14 Utah, 305, 47 Pac. 147; *St. Paul Trust Co. v. St. Paul Chamber of Commerce*, 64 Minn. 439, 67 N. W. 350.

³⁹ *Curry v. Van Wagner*, 32 Hun (N. Y.) 453. Although the original note was to be held as collateral. *Dundas v. Sterling*, 4 Pa. St. 73.

⁴⁰ *Maillard v. Page*, L. R. 5 Exch. 312. But an agreement for one renewal does not entitle the maker to several renewals. *Innes v. Munro*, 1 Exch. 473.

⁴¹ *Pratt v. Coman*, 37 N. Y. 440; *Myers v. Welles*, 5 Hill (N. Y.) 463; *Robertson v. Allen*, 3 Baxt. (Tenn.) 233. At least, prima facie. *Holzworth v. Koch*, 26 Ohio St. 33.

⁴² *Bank of Upper Canada v. Ockerman*, 15 U. C. C. P. 363.

⁴³ *Brooks v. Wright*, 13 Allen (Mass.) 72.

⁴⁴ *Michael v. Myers*, 7 Jur. 1156.

⁴⁵ "A little longer." *Atlantic Nat Bank v. Franklin*, 55 N. Y. 235. Or "beyond the day of maturity." *Ward v. Wick*, 17 Ohio St. 159. Or in a few weeks. *McLemore v. Powell*, 12 Wheat. 554. Or when the squatters are removed from the land conveyed. *Benson v. Harrison*, 39 Mo. 303. Or until the maker can pay from the proceeds of lumber, to be sold as fast as possible. *Union Nat. Bank v. Cross* (Wis.) 75 N. W. 992. Or "if you keep up the interest, as you have done." *Haydenville Sav. Bank v. Parsons*, 138 Mass. 53. But see, contra, so long as the maker should be assignee of A., *Brick v. Campbell*, 50 N. J. Law, 282, 13 Atl. 255.

agreement not to sue at maturity, although he may have an independent action for damages for breach of such agreement.⁴⁶ And this is true, in general, of an agreement on the holder's part not to sue until a given time after maturity.⁴⁷ So, the holder cannot set up a verbal agreement that the bill might be paid in installments other than as provided by its terms.⁴⁸ And parol evidence is inadmissible to show a contemporaneous agreement for future renewals.⁴⁹

If the holder receives collateral security without an agreement for time, it will not amount to an extension.⁵⁰ So, if he takes a new bill payable at a future day as collateral merely, although he afterwards transfers such bill to a bona fide holder;⁵¹ especially where there is an express agreement that it shall be received as collateral only.⁵² And if the payee of a check procures it to be certified, it will not be such an extension of time to the drawee as will discharge the drawer.⁵³

§ 1821. It is not an extension to write to the indorser that the maker is "unable to pay for a few days, and says he shall be ready in a week, which will be in time for me";⁵⁴ or to offer, after the bill is dishonored, to give time on a certain condition which is not

⁴⁶ *Atwood v. Lewis*, 6 Mo. 392.

⁴⁷ *Byles, Bills*, 241; *Thimbleby v. Barron*, 3 Mees. & W. 210; *Ford v. Beech*, 11 Q. B. 367; *Lowe v. Blair*, 6 Blackf. (Ind.) 282; *Bridge v. Tierman*, 36 Mo. 439. But, to the effect that a verbal agreement, after maturity, for further time, may be set up in bar to a suit on the note, see *Fisher v. Stevens* (Mo. Sup.) 44 S. W. 769.

⁴⁸ *Besant v. Cross*, 10 C. B. 895.

⁴⁹ *Hoare v. Graham*, 3 Camp. 57; *Dawson v. Bank*, 5 Ill. 56; *Bond v. Worley*, 26 Mo. 253. Especially where it is only proved by an unsigned indorsement on the envelope containing the note. *Central Bank v. Willard*, 17 Pick. (Mass.) 150. And where no application is made for the renewal. *Gibbon v. Scott*, 2 Starkie, 286.

⁵⁰ *Cherry v. Miller*, 7 Lea (Tenn.) 305; *Mills v. Gould*, 14 Ind. 278; *Allen v. O'Donald*, 28 Fed. 17; *Continental Life Ins. Co. v. Barber*, 50 Conn. 569. Although maturing at a later day. *Fisher v. Bank*, 22 Colo. 373, 45 Pac. 440. So, where both bill and collateral were placed in the hands of an attorney to collect. *Mendenhall v. Lenwell*, 5 Blackf. (Ind.) 125.

⁵¹ *Pring v. Clarkson*, 1 Barn. & C. 14.

⁵² *Shaw v. Crawford*, 16 U. C. Q. B. 101.

⁵³ *Warrensburg Co-operative Bldg. Ass'n v. Zoll*, 83 Mo. 94.

⁵⁴ *Margesson v. Goble*, 2 Chit. 364.

performed,⁵⁵ e. g. on condition of receiving a certain payment, which was only made in part;⁵⁶ or to agree to pay out of the funds that shall come to an executor's hands within a given time.⁵⁷ So, mere delay upon receiving a part payment is not an extension;⁵⁸ nor the receiving of a cognovit, payable in installments, with the proviso that the judgment should be entered on any default, if judgment was, in fact, entered on the first default and without any actual loss of time.⁵⁹

The defendant must prove that the extension relied on was made by one who was the holder of the bill at the time.⁶⁰ A pledgee has no authority to grant an extension, and cannot bind his pledgor by such act.⁶¹ So, an extension by an indorser will not bind subsequent parties without their consent, nor discharge prior parties as to them.⁶² So, an indorser will not be discharged by the holder's agreement with a stranger to give time if he would see the bill paid.⁶³ And if the extension is granted, after suit begun against acceptor and indorser, by taking a warrant of attorney from the acceptor, it cannot be pleaded in bar by the indorser.⁶⁴ If, however, an extension is given to the maker after a joint judgment recovered against him and the indorser, it has been held to discharge the latter and support an injunction on his behalf against further proceedings.⁶⁵

⁵⁵ *Hewet v. Goodrick*, 2 Car. & P. 468. It must appear that the agreement was accepted by the maker. *Hefford v. Morton*, 11 La. 115.

⁵⁶ *Badnall v. Samuel*, 3 Price, 521.

⁵⁷ *Muir v. Lawrie*, 11 U. C. C. P. 252.

⁵⁸ *Hunt v. Bridgham*, 2 Pick. (Mass.) 581.

⁵⁹ *Price v. Edmunds*, 10 Barn. & C. 578.

⁶⁰ *Britton v. Fisher*, 26 U. C. Q. B. 338. A valid extension cannot be made by the payee after indorsement. *Zobel v. Bauersachs* (Neb.) 75 N. W. 43. Nor by a collecting agent, under instructions "not to let the note outlaw." *Low v. Warden*, 77 Cal. 94, 19 Pac. 235.

⁶¹ *Key v. Fielding*, 32 Ark. 56.

⁶² *Claridge v. Dalton*, 4 Maule & S. 226.

⁶³ *Frazer v. Jordan*, 8 El. & Bl. 303.

⁶⁴ *Lee v. Levy*, 4 Barn. & C. 390.

⁶⁵ *Van Koughnet v. Mills*, 5 Grant (U. C.) 653.

Consideration for Extension.

§ 1822. A valid extension requires a sufficient consideration.⁶⁶ It is sufficient to permit a co-defendant to leave confinement under a ca. sa. for the purpose of becoming a witness in another case.⁶⁷ The prepayment of interest is a sufficient consideration;⁶⁸ or the agreement to pay interest,⁶⁹ or to complete his title to the lands mortgaged for security,⁷⁰ or merely to forego his right to make payment.⁷¹ So, too, a usurious payment, if actually made.⁷² And even the giving of a usurious note has been held to be sufficient consideration for the extension of another note.⁷³ But an agreement to pay usurious interest for an extension is not sufficient;⁷⁴ nor a mere part payment on account of the debt;⁷⁵ nor an agreement to pay part at maturity and give a note for the balance;⁷⁶ nor a payment of interest already accrued,⁷⁷ or another debt already due;⁷⁸ nor a promise

⁶⁶ *Rumberger v. Golden*, 99 Pa. St. 34; *Fridenberg v. Robinson*, 14 Fla. 130; *Howe v. Klein*, 89 Me. 376, 36 Atl. 620; *Tuskaloosa Cotton-Seed Oil Co. v. Perry*, 85 Ala. 158, 4 South. 635. And see § 492, *supra*. But an executrix's promise to pay out of her private income is not sufficient. *Philpot v. Briant*, 4 Bing. 717.

⁶⁷ *Bank of U. S. v. Hatch*, 6 Pet. 250.

⁶⁸ *Starret v. Burkhalter*, 86 Ind. 439; *St. Joseph Fire & Marine Ins. Co. v. Hauck*, 71 Mo. 405. And see §§ 492, 965.

⁶⁹ *Nelson v. Flagg*, 18 Wash. 30, 50 Pac. 571.

⁷⁰ *McKinnon v. Palen*, 62 Minn. 188, 64 N. W. 387.

⁷¹ *Simpson v. Evans*, 44 Minn. 419, 46 N. W. 908.

⁷² *Vary v. Norton*, 6 Fed. 808; *Wild v. Howe*, 74 Mo. 551; *Niblack v. Champeny* (S. D.) 72 N. W. 402.

⁷³ *Fay v. Tower*, 58 Wis. 286, 16 N. W. 558.

⁷⁴ *Ives v. Bosley*, 35 Md. 262; *Lewis v. Harbin*, 5 B. Mon. (Ky.) 564; *Green v. Lake*, 2 Mackey, 162; *Denick v. Hubbard*, 27 Hun (N. Y.) 347.

⁷⁵ *Berry v. Bates*, 2 Blackf. (Ind.) 118; *Bailey v. Adams*, 10 N. H. 162; *Prather v. Gammon*, 25 Kan. 379; *Ingels v. Sutliff*, 30 Kan. 444, 13 Pac. 828. So, the payment of \$10 and interest due. *Nightingale v. Meginnis*, 34 N. J. Law, 461.

⁷⁶ *Miller v. Holbrook*, 1 Wend. (N. Y.) 317.

⁷⁷ *Kellogg v. Olmsted*, 28 Barb. (N. Y.) 96; *Howard v. Fletcher*, 59 N. H. 151; *Russ v. Hobbs*, 61 N. H. 93.

⁷⁸ *Wolz v. Parker*, 134 Mo. 458, 35 S. W. 1149.

on the maker's part to pay the note, already matured, in installments.⁷⁹

Satisfaction—What is.

§ 1823. Some benefit to the holder of a bill is necessary to a valid satisfaction.⁸⁰ It may be the mere relinquishment of a doubtful suit.⁸¹ But if the plaintiff proves a compromise in satisfaction, he can only recover the balance due on such compromise, although he has declared for the whole amount originally due on the bill.⁸²

If the holder receives security from the principal in satisfaction of the bill, it will discharge the surety, even though the holder's rights against other parties are reserved.⁸³ But if the principal gives in satisfaction a deed, which is declared void as made in contemplation of bankruptcy, the surety will not be discharged.⁸⁴ Satisfaction given by the drawer of a bill does not necessarily discharge the acceptor, since he is primarily liable.⁸⁵ But if a bill was accepted for the drawer's accommodation, and is satisfied by him, the acceptor will be discharged.⁸⁶ And an indorsee will be bound by satisfaction on a nonnegotiable note made without notice of its assignment with the original payee.⁸⁷

On the other hand, the drawer will not be discharged, although the acceptor had funds of his in hand both at the time of acceptance and at the maturity of the bill, and died leaving a partnership interest

⁷⁹ *McManus v. Bark*, L. R. 5 Exch. 65; *Jennings v. Chase*, 10 Allen (Mass.) 526.

⁸⁰ *Byles, Bills*, 237; *Cumber v. Wane*, 1 Strange, 426. But satisfaction by notes of a third party sent to the indorsees, A. & B., before maturity, but after they had indorsed to B. & C. (their correspondents, with a common partner, B.), to cover advances, will bind both firms, although made without the knowledge of the latter. *Jacaud v. French*, 12 East, 317.

⁸¹ *Longridge v. Dorville*, 5 Barn. & Ald. 117. So, where the doubt is reasonable but unfounded. *Cook v. Wright*, 30 L. J. Q. B. 321.

⁸² *Browning v. Crouse*, 43 Mich. 489, 5 N. W. 664.

⁸³ *Boulton v. Stubbbs*, 18 Ves. 20.

⁸⁴ *Harner v. Batdorf*, 35 Ohio St. 113.

⁸⁵ *Jones v. Broadhurst*, 9 C. B. 173. But see, contra, where the bill was discounted for the drawer, *Williams v. Jones*, 77 Ala. 294.

⁸⁶ *Bradford v. Hubbard*, 8 Pick. (Mass.) 155. Although the accommodation was not known to the holder. *Rolfe v. Wyatt*, 5 Car. & P. 181.

⁸⁷ *Shade v. Creviston*, 93 Ind. 501.

sufficient to pay the bill, which his executor authorized the administrator of the other partner (who was also one of the holders of the bill) to apply to the payment of the bill.⁸⁸ A bill may even be satisfied by one who is not a party to it.⁸⁹ Thus, if a note is secured by mortgage, and paid by a purchaser of the mortgaged premises who bought subject to the mortgage, it would be extinguished.⁹⁰ But the recovery of judgment against a sheriff for not returning an execution against the maker will not discharge an indorser or prevent his recovery against prior indorsers.⁹¹

Satisfaction by Payment.

§ 1824. A bill or note may be satisfied by the payment by a third person of an amount less than its face;⁹² but not by such payment of a smaller amount made by the debtor himself.⁹³ Even if one joint maker, who is a surety, makes a part payment, on an agreement that he shall be discharged and his co-maker alone still held for the balance, he will remain liable.⁹⁴ But if the bill is given up and can-

⁸⁸ *Barnes v. Ryder*, 3 McLean, 374, Fed. Cas. No. 1,020.

⁸⁹ *Byles, Bills*, 237; *Belshaw v. Bush*, 11 C. B. 207. Although formerly held insufficient. *Grymes v. Blofield*, Cro. Eliz. 541; *James v. Isaacs*, 12 C. B. 791. But it must be fully executed. *James v. David*, 5 Term R. 141. And the plea must show that it was given on the debtor's account, or ratified by him. *Kemp v. Balls*, 10 Exch. 607.

⁹⁰ *Appledorn v. Streeter*, 20 Mich. 9. So, if collateral security is sold and the purchaser gives his own note in payment. *Pauly v. Willson*, 57 Fed. 548.

⁹¹ *Baker v. Martin*, 3 Barb. (N. Y.) 634.

⁹² *Byles, Bills*, 237; *Chit. Bills*, 442; *Welby v. Drake*, 1 Car. & P. 557; *Gordon v. Moore*, 44 Ark. 349. But part payment by the acceptor will not discharge the drawer. *Lynch v. Reynolds*, 16 Johns. (N. Y.) 41.

⁹³ *Fitch v. Sutton*, 5 East, 230; *Down v. Hatcher*, 2 Perry & D. 292; *Perkins v. Lockwood*, 100 Mass. 249; *Works v. Hershey*, 35 Iowa, 340; *Carrier v. Jones*, 68 N. C. 127. Unless paid in settlement of an account with cross demands. *Smith v. Page*, 15 Mees. & W. 683. But see, contra, if paid under an agreement for satisfaction, *Stewart v. Hidden*, 13 Minn. 43 (Gil. 29); although it was not paid at the time agreed, *Longworth v. Askren*, 15 Ohio St. 370. And it was held in *Schweider v. Lang*, 29 Minn. 254, 13 N. W. 33, that the maker was liable to the payee for transferring the note in violation of his agreement to accept a smaller amount before maturity in satisfaction.

⁹⁴ *Harrison v. Close*, 2 Johns. (N. Y.) 448; *Clayton v. Clark*, 74 Miss. 499,

celed on a partial payment, and there is no fraud or mistake, it will be a full discharge.⁹⁵ On the other hand, an agreement to accept payment of part, or payment in installments, in satisfaction of the whole, will not discharge the bill until the payment is made and the agreement fully executed.⁹⁶ And, even if the acceptor pays part of the bill upon the holder's promise to look to the drawer for the balance, the acceptor will not be discharged.⁹⁷ But an agreement by a third party, not otherwise individually liable on the paper, to pay a less amount than its face, is a sufficient satisfaction.⁹⁸ So, if a note is made by a partnership, A. & B., and A. afterwards transfers to the holder his interest in the partnership (exceeding the amount of the note), upon an agreement that the note shall be canceled, it will be a satisfaction, without regard to his share of the partnership debts.⁹⁹

21 South. 565, 22 South. 189. Especially where the agreement was made between the co-makers and not with the holder. *Shed v. Pierce*, 17 Mass. 623.

⁹⁵ *Kent v. Reynolds*, 8 Hun (N. Y.) 559; *Bowker v. Childs*, 3 Allen (Mass.) 434; *Ellsworth v. Fogg*, 35 Vt. 355.

⁹⁶ *Blake v. Blake*, 110 Mass. 202; *Young v. Jones*, 64 Me. 563; *Carraway v. Odeneal*, 56 Miss. 223; *Wheeler v. Wheeler*, 11 Vt. 60; *Lee v. Oppenheimer*, 32 Me. 253; *Rea v. Owens*, 37 Iowa, 262; *Hyams v. Levy*, 1 Speers (S. C.) 368. So, a fortiori, a part payment by the maker, and his promise to pay the balance on request, the note not being surrendered. *Peterson v. Wheeler*, 45 Mo. 369. And the payment of part, by each of several successive indorsers, to the last indorsee, under their agreement, is no satisfaction, even between themselves, to discharge the liability of the first indorser to the second. *Keeler v. Bartine*, 12 Wend. (N. Y.) 110. Judgment in favor of the holder on plea of payment, and proof of agreement to settle for a smaller sum, will not bar an action by the maker on the agreement. *Hunt v. Brown*, 146 Mass. 253, 15 N. E. 587.

⁹⁷ *Parker v. Leigh*, 2 Starkie, 228.

⁹⁸ E. g. by one partner of the firm indebted. *Thompson v. Percival*, 5 Barn. & Adol. 925, 3 Nev. & M. 167. Or by several joint makers, one making an assignment of property, and each assuming a several liability to their co-maker and surety, who had taken up the joint note and given his individual note for it. *Lapham v. Barnes*, 2 Vt. 213.

⁹⁹ *Bates v. Rosekrans*, 37 N. Y. 409.

Satisfaction by Bill or Note.

§ 1825. The bill of a third person, even for a less amount, will be a sufficient satisfaction, if actually received,¹⁰⁰ and delivered,¹⁰¹ as such. It has been held, too, that the debtor himself may satisfy his bill by a negotiable security for a less amount, given and accepted as such;¹⁰² especially if other parties are liable upon the new instrument.¹⁰³ But an agreement to take a certain note in payment, upon the happening of a certain event, will not be binding on the holder, after the note has become due and been dishonored.¹⁰⁴ If a bill or note is taken in full satisfaction and discharge of the original debt,

¹⁰⁰ *Ralli v. Dennistoun*, 6 Exch. 483. Or a third person's check for a less amount. *Guild v. Butler*, 127 Mass. 386.

¹⁰¹ *Hibbard v. Eastman*, 47 N. H. 507. But a mere agreement for the note of a third person is not sufficient, although tendered by the maker. *Hawley v. Foote*, 19 Wend. (N. Y.) 516. And an agreement between one of the makers and the cashier of the bank which holds the note is not a satisfaction, until it is assented to by the bank, and the new note is substituted as agreed. *Robertson v. Bank*, 41 Mich. 356, 1 N. W. 1033. So, it is not a satisfaction, if the acceptor sends another bill, not mentioning the original acceptance, and the payee discounts the latter as collateral, and sends the excess in amount to the acceptor. *Pring v. Clarkson*, 1 Barn. & C. 14.

¹⁰² *Sibree v. Tripp*, 15 Mees. & W. 23. If so received. *Brown v. Kewley*, 2 Bos. & P. 518; *Bunge v. Koop*, 48 N. Y. 225; *Brooks v. White*, 2 Metc. (Mass.) 283. And given. *Crisp v. Griffiths*, 2 Crompt., M. & R. 159, 3 Dowl. 752. Especially if given in pursuance of a previous agreement for ascertainment and correction of the original amount. *Murray v. Reed*, 17 Wash. 1, 48 Pac. 343. But see *Manhood v. Crick*, Cro. Eliz. 716. And an agreement to receive notes and cash, amounting altogether to much less than the debt, has been held not to be a satisfaction, but the statute limiting actions against corporate stockholders to one year from the accruing of the corporate debt will run from its original maturity, and not from the agreement, nor from the date of the note. *Parrott v. Colby*, 71 N. Y. 597, affirming 6 Hun (N. Y.) 55. A note for a smaller amount may be taken in full satisfaction of a disputed claim against the maker. *Northern Liberty Market Co. v. Kelly*, 113 U. S. 190, 5 Sup. Ct. 422. So, too, a check. *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089. And see *Fuller v. Kemp*, 20 Lawy. Rep. Ann. 785, note (s. c. 138 N. Y. 231, 33 N. E. 1034).

¹⁰³ *Hardman v. Bellhouse*, 9 Mees. & W. 596; *Brooks v. White*, 2 Metc. (Mass.) 283; *Maddux v. Bevan*, 39 Md. 485.

¹⁰⁴ *Da Costa v. O'Rourke*, 12 Phila. 223.

the latter will not revive upon its dishonor.¹⁰⁵ A bill may also be satisfied by a tender of the holder's own certificate of deposit, properly indorsed.¹⁰⁶

Satisfaction by Other Security.

§ 1826. A note may be satisfied by a higher security taken in its stead; but such security must be co-extensive with the original instrument. Thus, a several mortgage by one of the makers of a joint and several note has been held not to be a sufficient satisfaction.¹⁰⁷ The tender of stock certificates, under an agreement to take them in full satisfaction, is sufficient.¹⁰⁸ So, the assignment of a judgment¹⁰⁹ and a mortgage is a complete satisfaction, if so received,¹¹⁰ although given long after the maturity of the note,¹¹¹ or for a longer time than the note, but containing no mention of it;¹¹² but not a deed or mortgage given as collateral merely.¹¹³

Payment of the collateral will, however, discharge to that extent the debt secured, although the payment is made by giving other notes in exchange.¹¹⁴ So, after taking collateral notes, an agreement to

¹⁰⁵ Byles, Bills, 238; Chit. Bills, 198; *Sard v. Rhodes*, 1 Mees. & W. 153, 1 Tyrw. & G. 298; *Kearlake v. Morgan*, 5 Term R. 513; *Crisp v. Griffiths*, 2 Crompt., M. & R. 159. As to the effect of payment by bill or note, see *supra*, chapter 41.

¹⁰⁶ *Lord v. Favorite*, 29 Ill. 149. Or a warehouse receipt. *Burch v. Hubbard*, 48 Ill. 164.

¹⁰⁷ *Ansell v. Baker*, 15 Q. B. 20.

¹⁰⁸ *Brown v. Smith*, 122 Mass. 589. Notwithstanding the subsequent giving of a new note, without prejudice, to save the statute of limitations. *Baker v. Hawkins*, 14 R. I. 359.

¹⁰⁹ *First Nat. Bank of Indianapolis v. New*, 146 Ind. 411, 45 N. E. 597.

¹¹⁰ *Fraser v. Armstrong*, 10 U. C. C. P. 506.

¹¹¹ *McLeod v. McKay*, 20 U. C. Q. B. 258.

¹¹² *Mathewson v. Brouse*, 1 U. C. Q. B. 272.

¹¹³ Byles, Bills, 240; *Bedford v. Deakin*, 2 Barn. & Ald. 210, 2 Starkie, 178; *Kerr v. Hereford*, 17 U. C. Q. B. 158; *Murray v. Miller*, 1 U. C. Q. B. 353; *Commercial Bank v. Cuivillier*, 18 U. C. Q. B. 378; *Gore Bank v. McWhirter*, 18 U. C. C. P. 293; *Gore Bank v. Eaton*, 27 U. C. Q. B. 332. Especially where it failed to take effect by reason of the grantor's bankruptcy. *Harner v. Batdorf*, 35 Ohio St. 113.

¹¹⁴ *Post v. Bank*, 159 Ill. 421, 42 N. E. 976. And, conversely, payment of the debt secured will discharge the maker of a collateral note. *Merrill v. Bank*, 94 Cal. 59, 29 Pac. 242.

accept part of them in satisfaction, with a cash payment for a large debt, and to surrender the balance of the collateral.¹¹⁵

If a mortgage is given in satisfaction of a note secured by vendor's lien, it will discharge the collateral vendor's lien as well.¹¹⁶ So, a chattel mortgage received after the maturity of a note is a good satisfaction.¹¹⁷ So, if a chattel mortgage is given, and sufficient of the mortgaged property is sold to pay the note.¹¹⁸ And a note made by a husband for his wife's benefit may be satisfied by the wife's mortgage received as such.¹¹⁹ So, if the maker agrees to sell land to the payee, and receive his note in part payment, it will be a satisfaction of the original note.¹²⁰

But a verbal agreement by the payee to surrender the note to the maker on settlement of his account with another person, to whom the payee was not in any way liable, will not be a satisfaction of the note until it is executed.¹²¹ So, an agreement for a cash payment and the conveyance of land at a certain valuation, which, if done in three months, should be a satisfaction of a note for a larger sum, has been held, on conveyance at a later day, to amount only to a part payment of the note to the extent of the valuation agreed.¹²² If a note is given for land, and the land is conveyed to the holder, to be reconveyed by him on payment of the note, it will be a satisfaction, and discharge the indorsers.¹²³ So, if the holder agrees to receive a mortgage in satisfaction, and on receiving it objects to it, but retains it, and afterwards forecloses it, it is a

¹¹⁵ *Lincoln Sav. Bank & Safe-Deposit Co. v. Allen*, 27 C. C. A. 87, 82 Fed. 148.

¹¹⁶ *White v. Dougherty*, Mart. & Y. (Tenn.) 308.

¹¹⁷ Notwithstanding an offer to prove that it was received as collateral only. *Parker v. McCrea*, 7 U. C. C. P. 124.

¹¹⁸ *Bank of British North America v. Jones*, 8 U. C. Q. B. 86. So, under a trust deed given by the surety after maturity of the note. *Smith v. Clopton*, 48 Miss. 66. And the property represented by a collateral mortgage will discharge the note, if received absolutely in satisfaction, although it afterward proves insufficient in amount. *Smith v. Judson*, 4 U. C. Q. B. (O. S.) 134.

¹¹⁹ *Caryl v. Williams*, 7 Lans. (N. Y.) 416.

¹²⁰ *Jarratt v. Wilson*, 70 N. C. 401.

¹²¹ *Noble v. Edes*, 51 Me. 34.

¹²² *Makepeace v. College*, 10 Pick. (Mass.) 298.

¹²³ *Ives v. Bank*, 12 Mich. 361.

waiver of his objection and a discharge of the bill;¹²⁴ even though he repudiates the mortgage for fraud, without formally releasing it or reconveying the property.¹²⁵

But the foreclosure of a chattel mortgage made by a married woman as security for her husband's note will not operate as a payment, pending action brought by her for conversion.¹²⁶

Satisfaction by Services or Merchandise.

§ 1827. An agreement to credit on a note work afterwards done for the payee will amount to a satisfaction.¹²⁷ So, an agreement that the maker's payment as surety on a bond of the payee should be credited on his note;¹²⁸ or an agreement on the maker's part to procure a transfer and release of certain liens on the payee's land;¹²⁹ or even a verbal agreement for satisfaction by insurance premiums to be paid by the maker, and orders to be drawn on him, the payments being made accordingly;¹³⁰ or by an order for mules, the order being so received, and the mules ready for delivery.¹³¹ If A. gives his note to B. for goods purchased by B. of C., in fraud of C.'s creditors, and transferred to A. to sell and pay the proceeds to C., A.'s performance of the agreement will be a satisfaction of the note, as against C.'s creditors.¹³² And if the holder receives from the maker a power of attorney to collect certain debts, agreeing that

¹²⁴ Johnson v. Watt, 15 La. Ann. 428.

¹²⁵ Adams v. Nelson, 22 U. C. Q. B. 199.

¹²⁶ Handy v. Tracy, 150 Mass. 524, 23 N. E. 226.

¹²⁷ Jennings v. Davis, 31 Conn. 134. So, a bill for board, if so agreed. Whittaker v. Ordway (N. H.) 38 Atl. 789. But an administrator's agreement, as holder, to accept in payment work done on lands of his intestate, can only be enforced by independent suit or by way of counterclaim. Cook v. Cook, 24 S. C. 204.

¹²⁸ Ward v. Winship, 12 Mass. 481.

¹²⁹ Treadwell v. Himmelmann, 50 Cal. 9.

¹³⁰ And such defense is admissible under a plea of payment. Jones v. Snow, 64 Cal. 456, 2 Pac. 28.

¹³¹ Pettigrew v. Dix, 33 Tex. 277. Although they ran away before delivery. Costar v. Davies, 8 Ark. 213. But not so a delivery of goods, which became void by the debtor's subsequent bankruptcy. Maxfield v. Jones, 76 Me. 135.

¹³² Carpenter v. McClure, 37 Vt. 127.

it shall be a satisfaction of the note, it will be so, although he afterwards transfers them for less than the amount of the note.¹³³ And, where the holder agrees to accept an interest in a claim of the maker against the United States government, an actual transfer of such interest will not be necessary to a complete satisfaction.¹³⁴

Where the maker's debt was assumed by A., and A.'s receipt for a government bond taken in satisfaction, to be delivered to him on demand, it was held to be a full satisfaction, although A. afterwards became insolvent, and never delivered the bond.¹³⁵ But an executory agreement to give a bond and mortgage will not be a satisfaction, if it is not performed.¹³⁶ Neither is a verbal agreement on the holder's part, to receive a debt due to the acceptor from another, of itself sufficient;¹³⁷ nor a promise, without other consideration, to accept Confederate notes in payment.¹³⁸ And, in general, an agreement, to be a satisfaction and substitute for payment, must be strictly performed.¹³⁹ And if the maker claims to have satisfied a bill by a delivery of goods, which have been so received, it must be specially averred, and cannot be properly shown under a plea of payment.¹⁴⁰

Merger in Judgment.

§ 1828. In general, a judgment merges a bill or note, as between the parties to it.¹⁴¹ If a judgment has been recovered and satisfied by an attorney, whatever the consideration may be, no further ac-

¹³³ *Samples v. Samples*, 2 N. M. 239.

¹³⁴ *Whitney v. Cook*, 53 Miss. 551.

¹³⁵ *Colgrove v. Tallman*, 2 Lans. (N. Y.) 97.

¹³⁶ *Overton v. Harvey*, 9 C. B. 324.

¹³⁷ *Kemp v. Watt*, 15 Mees. & W. 672.

¹³⁸ *Lewis v. Davisson*, 29 Grat. (Va.) 216.

¹³⁹ *Strickland v. Lee*, 65 Md. 384, 4 Atl. 884. So, where a note is given for the actual debt conditioned for a release on payment of a smaller sum. *Waggoner v. Cox*, 40 Ohio St. 539. And see, as to a subsequent unperformed agreement to sell goods and receive the note in payment, *Hayes v. Allen*, 160 Mass. 286, 35 N. E. 852.

¹⁴⁰ *Ulsch v. Muller*, 143 Mass. 379, 9 N. E. 736.

¹⁴¹ *Byles, Bills*, 239; *Eldred v. Insurance Bank*, 17 Wall. 545; *Woodworth v. Spafford*, 2 McLean, 168, Fed. Cas. No. 18,020. And such judgment destroys its negotiable quality. *Brown v. Foster*, 4 Ala. 282. But a judgment

tion will lie on the note.¹⁴² And, where judgment has been rendered on a note, a second judgment cannot be had in another district.¹⁴³ But a warrant of attorney to confess judgment is no merger, until judgment is actually entered.¹⁴⁴ And an action upon a note will not be barred by judgment rendered on the same note in an attachment suit, if there has been no appearance and no personal judgment;¹⁴⁵ nor by judgment against others as co-makers in another state, having no jurisdiction over the defendant;¹⁴⁶ nor by judgment against a corporation on a note executed by its officers, in an action to enforce their individual liability.¹⁴⁷

If a note is given to secure certain fines and penalties, a judgment once entered upon it and paid will be a bar to further action on the note for subsequent fines.¹⁴⁸ And, where several notes are given for different installments, suit upon one may be barred by a judgment rendered on the other, upon a defense which is necessarily good as to all if good as to one.¹⁴⁹

But a confession of judgment, in favor of the payee after transfer, will not bar an action by the indorsee.¹⁵⁰ And, if several notes are held as collateral for a debt, a judgment rendered on one of them,

fraudulently confessed by the defendant, without plaintiff's authority, in plaintiff's favor, for use of defendant, is no defense. *Mount v. Scholes*, 120 Ill. 394, 11 N. E. 401.

¹⁴² *Fogg v. Sanborn*, 48 Me. 432. But, if an indorser pays a judgment rendered against him and the maker, he may set up the note against a claim made by the maker's assignee. *Kelsey v. Bradbury*, 21 Barb. (N. Y.) 531.

¹⁴³ *Schuler v. Israel*, 27 Fed. 851. And suit pending in a state court is no defense to an action brought in the United States court. *Hyde v. Stone*, 20 How. 170.

¹⁴⁴ *Byles, Bills*, 239; *Chit. Bills*, 200; *Norris v. Aylett*, 2 Camp. 329.

¹⁴⁵ *Smith v. Curtiss*, 38 Mich. 393. So, an attachment not yet in judgment. *Wilson v. Bank*, 45 Pa. St. 488.

¹⁴⁶ *Stone v. Walnwright*, 147 Mass. 201, 17 N. E. 301.

¹⁴⁷ *First Nat. Bank of Brooklyn v. Wallis*, 150 N. Y. 455, 44 N. E. 1038, affirming 84 Hun, 376, 32 N. Y. Supp. 382.

¹⁴⁸ *Siddall v. Rawcliffe*, 1 Crompt. & M. 487, 1 Moody & R. 263. So, where an accommodation indorsement for the maker is transferred to secure his debt to A., a judgment rendered on it against the indorser at the suit of A. bars recovery by B., although the maker and A. had agreed that it should secure B. also. *Erwin v. Lynn*, 16 Ohio St. 539.

¹⁴⁹ *Cleveland v. Creviston*, 93 Ind. 31.

¹⁵⁰ *Bank of Montreal v. Douglas*, 17 U. C. Q. B. 208.

although it is collectible, will be no bar to an action on the others.¹⁵¹ If judgment is rendered on a collateral note, and, after being collected in part, is assigned to the debtor, it will be a satisfaction of the debt to the extent of the amount collected, and no more.¹⁵² So, the foreclosure of a collateral mortgage will not extinguish the holder's right to bring suit on the note secured.¹⁵³

Judgment against Prior Parties.

§ 1829. A judgment rendered on an account is no defense to a note subsequently given for it.¹⁵⁴ So, if judgment is rendered on a note secured by mortgage, and it is paid by the maker, it will be no bar to a subsequent action in equity for subrogation to the mortgage, as against intervening claims.¹⁵⁵ If, in consideration of the discount of a bill, the drawer agrees to pay a certain sum monthly, as interest after maturity, if the bill is not paid at maturity, a recovery on such agreement will be barred, as to interest before or after maturity, by a judgment on the bill.¹⁵⁶ But where a holder has recovered interest on a note, it will be no bar to a subsequent action for the principal, which had not then matured.¹⁵⁷

A party to a bill or note is not discharged by judgment on it in favor of subsequent parties.¹⁵⁸ So, a judgment on a note against one party will not extinguish it as against other parties, either prior

¹⁵¹ *Smith v. Hunter*, 33 Ind. 106. So, judgment on a note for the debt is no bar to action on a collateral note. *Burnham v. Windram*, 164 Mass. 313, 41 N. E. 305. And see § 1590, *supra*.

¹⁵² *Burnhelmer v. Hart*, 27 Iowa, 19.

¹⁵³ *Vance v. English*, 78 Ind. 80. So, conversely, judgment on the note secured is no discharge of the collateral. *Fisher v. Fisher*, 98 Mass. 303. But a foreclosure sale to the holder under a collateral mortgage has been held to satisfy the notes, although made subject to unmatured installments on the notes. *Shermer v. Merrill*, 33 Mich. 284.

¹⁵⁴ *Clark v. Young*, 1 Cranch, 181.

¹⁵⁵ *Orrick v. Durham*, 79 Mo. 174.

¹⁵⁶ *Florence v. Jennings*, 2 C. B. (N. S.) 454.

¹⁵⁷ *Andover Sav. Bank v. Adams*, 1 Allen (Mass.) 28. And see § 1589, *supra*.

¹⁵⁸ *Byles, Bills*, 239; *Tarleton v. Allhusen*, 2 Adol. & E. 32. At the suit of a purchaser after maturity without notice. *McLennan v. McMonies*, 23 U. C. Q. B. 114.

or subsequent.¹⁵⁹ So, a decree in favor of the payee of a check, against the drawee, will be no defense to an action brought by the drawer, if it has not been paid.¹⁶⁰ If the drawer of a bill gives his warrant of attorney to confess judgment, it will be no discharge of an accommodation acceptor.¹⁶¹ So, a judgment and execution against the maker of a note, stayed by interpleader, is no bar to an action against the indorser.¹⁶²

Judgment against Joint Debtors.

§ 1830. A judgment against one joint acceptor or joint maker discharges the others.¹⁶³ But a court of equity may grant relief on the ground of mistake.¹⁶⁴ If one of several joint debtors gives his individual bill for part of the amount, judgment rendered on it will be no bar to an action on the joint debt against all.¹⁶⁵ And a judgment against one joint debtor is no defense as to the other, where it is rendered against the sole survivor, or against all who reside within the jurisdiction.¹⁶⁶ And the mere allowance of a note by the administrator of a deceased joint maker is not a merger, and cannot be pleaded as a former recovery in an action brought against the estate of the other.¹⁶⁷ So, if a judgment against one joint maker is afterwards set aside, it will not be available to extinguish the debt of the other.¹⁶⁸ So, a judgment rendered in favor of one maker on his separate defense, and afterwards reversed on appeal, is not subject, upon a new trial, to the defense of a judgment rendered mean-

¹⁵⁹ Byles, Bills, 239; *Claxton v. Swift*, 2 Show. 441.

¹⁶⁰ *Schuler v. Israel*, 27 Fed. 851.

¹⁶¹ *Smith v. Knox*, 3 Esp. 46.

¹⁶² *Rice v. Groff*, 58 Pa. St. 116.

¹⁶³ Byles, Bills, 239; *Kling v. Hoare*, 13 Mees. & W. 494; *Mason v. Eldred*, 6 Wall. 231; *Ward v. Johnson*, 13 Mass. 148; *Farwell v. Hilliard*, 3 N. H. 318; *Odell v. Carpenter*, 71 Ind. 463; *Archer v. Helman*, 21 Ind. 29. So, a judgment by confession taken under the New York Code. *Candee v. Smith*, 93 N. Y. 349.

¹⁶⁴ *Hollowell v. Macdonell*, 8 U. C. C. P. 21.

¹⁶⁵ *Chit. Bills*, 200; *Drake v. Mitchell*, 3 East, 251.

¹⁶⁶ *Cox v. Maddux*, 72 Ind. 206.

¹⁶⁷ *Fiscus v. Robbins*, 60 Ind. 100.

¹⁶⁸ *Maghee v. Collins*, 27 Ind. 83.

while against the other maker.¹⁶⁹ And where a party buys goods and gives a note in his own name, a judgment rendered against him will bar a suit against secret partners afterwards discovered.¹⁷⁰ So, if a judgment is rendered against one joint and several acceptor or maker, it will be no defense as to the other.¹⁷¹ But a joint judgment on a joint and several note exhausts the holder's right of election, and merges the note.¹⁷²

Discharge by Execution.

§ 1831. An execution, or a release from execution, against property, is not a discharge, except between the immediate parties to it.¹⁷³ And this is true, also, of an execution against the body.¹⁷⁴ Thus, if an execution is issued against the body of the maker, and he is released by the jailer on a part payment, refused by the holder, after action brought against the indorser, the latter will not be discharged by such payment.¹⁷⁵ So, if the acceptor is discharged from an execution in favor of the indorsee, it will not discharge him as to the drawer.¹⁷⁶ And the note of A., taken as collateral for B.'s debt, will not be discharged by the imprisonment of B. on a *capias*, although the note was fraudulently collected by the creditor's agent, and misappropriated to a debt due from the creditor to himself.¹⁷⁷

¹⁶⁹ *Lawrence v. Sample*, 97 Ind. 53.

¹⁷⁰ *In re Herrick*, 13 N. B. R. 312, Fed. Cas. No. 6,420. Where the note was executed in the individual name. *Smith v. Black*, 9 Serg. & R. (Pa.) 142. Or even in a firm name, which did not disclose the individual partners. *Robertson v. Smith*, 18 Johns. (N. Y.) 459. A contrary decision in *Sheehy v. Mandeville*, 6 Cranch, 253, being overruled by *Mason v. Eldred*, 8 Wall. 231.

¹⁷¹ *Byles, Bills*, 239; *Giles v. Canary*, 99 Ind. 116. So, judgment on a *cognovit* against one joint and several maker will not discharge the other. *Ayrey v. Davenport*, 2 Bos. & P. 474.

¹⁷² *Baker v. Kinsey*, 41 Ohio St. 403.

¹⁷³ *Pole v. Ford*, 2 Chit. 125. And see § 1842, *infra*.

¹⁷⁴ *Hayling v. Mulhall*, 2 W. Bl. 1235. But such discharge has been held to release the other joint maker also. *Hyde v. Long*, 4 Vt. 531.

¹⁷⁵ *Porter v. Ingraham*, 10 Mass. 88.

¹⁷⁶ *Macdonald v. Bovington*, 4 Term R. 825.

¹⁷⁷ *Morse v. Woods*, 5 N. H. 297.

Extinguishment by Marriage—Death.

§ 1832. A note will be extinguished by the subsequent marriage of the maker and the payee.¹⁷⁸ And if the maker dies, no suit can be brought, in some states, against his estate, unless the note is presented for allowance in writing, and within a given time, by the holder or his agent.¹⁷⁹ And where a note matures more than two years after the maker's death, and his executor gives a bond to secure it, no action can be brought under the statute against legatees of the maker, unless the note has been presented for allowance within the time prescribed.¹⁸⁰

At common law, the death of one joint maker, leaving other survivors, discharged his estate from further liability at law.¹⁸¹ The personal representative of the deceased maker was not liable at law in such case, and could not recover contribution against a co-maker on payment voluntarily made by him.¹⁸² But making proof of the holder's claim on a note against the estate of a deceased joint maker does not discharge the liability of the survivor.¹⁸³

If the holder makes the maker or indorser his executor, he will thereby discharge him from liability at common law.¹⁸⁴ And in such case no action will lie against the maker by the administrator cum testamento annexo of the holder, even upon the resignation of the maker as executor.¹⁸⁵ And where the maker's debt is extinguished

¹⁷⁸ *Chapman v. Kellogg*, 102 Mass. 246; *Abbott v. Winchester*, 105 Mass. 115; *Curtis v. Brooks*, 37 Barb. (N. Y.) 476.

¹⁷⁹ *Marshall v. Perkins*, 72 Me. 343.

¹⁸⁰ *Pratt v. Lamson*, 128 Mass. 528.

¹⁸¹ See § 1668, *supra*. But this is not the law in INDIANA (*Eldred v. Bank*, 71 Ind. 543); nor in NEW JERSEY (2 Gen. St. p. 2336, § 3). And, after the joint liability is merged in a several judgment even against an accommodation maker, it will not be discharged by his dying before his co-maker. *Smith v. Kibbe*, 31 Hun (N. Y.) 390.

¹⁸² *Kennedy v. Carpenter*, 2 Whart. (Pa.) 344.

¹⁸³ *Louis v. Triscony*, 58 Cal. 304.

¹⁸⁴ *Byles, Bills*, 244; *Chit. Bills*, 610; *Sturleyn v. Albany*, Cro. Eliz. 150; *Cheetham v. Ward*, 1 Bos. & P. 630; *Lowe v. Peskett*, 16 C. B. 503. And see § 639, *supra*. Although he dies before obtaining letters testamentary. *Wankford v. Wankford*, 1 Salk. 305.

¹⁸⁵ *Tarbell v. Jewett*, 129 Mass. 457.

by his appointment as executor, he will be discharged, not only from liability to the payee's estate, but also to any person to whom the note is indorsed after the payee's death.¹⁸⁶ But the holder of a note does not discharge the maker by appointing the maker's executor as his executor.¹⁸⁷ And the appointment of the maker himself as executor will be no discharge as to creditors of the holder.¹⁸⁸

Discharge in Bankruptcy.

§ 1833. The bankruptcy of a debtor, in general, discharges such debts and existing liabilities as are provable against his estate. Thus, the liability of a first indorser to a second will be discharged, although both indorsed for the drawer's accommodation, and the second indorsed without knowledge of the accommodation character of the first.¹⁸⁹ If the drawer of a bill becomes bankrupt after its dishonor, although before it is taken up by the indorser, he will be discharged from liability to such indorser.¹⁹⁰ And the drawer of a bill is discharged from liability, on becoming bankrupt after it is drawn, but before it falls due.¹⁹¹ On the other hand, if the maker of a note becomes bankrupt, and it is afterwards paid, under compulsion of law, by an indorser, the maker will not be discharged from liability to him;¹⁹² although it has been held that an acceptor, becoming bankrupt after accepting a bill, and before its indorsement or payment by the indorser, is thereby discharged from liability to him.¹⁹³

A discharge in bankruptcy is, however, only a discharge of the bankrupt, and not of other parties.¹⁹⁴ Thus, if the indorser of a note

¹⁸⁶ *Freakley v. Fox*, 9 Barn. & C. 130; 4 Man. & R. 18; *Harmer v. Steele*, 4 Exch. 1.

¹⁸⁷ *Dorchester v. Webb*, Cro. Car. 372; *Alston v. Andrew*, Hut. 128.

¹⁸⁸ *Brown v. Selwyn*, Cas. t. Talb. 241; *Holliday v. Boas*, 1 Rolle, Abr. 920; *Woodward v. Lord Darcy*, Plow. 186; *Dorchester v. Webb*, Cro. Car. 372.

¹⁸⁹ *Houle v. Baxter*, 3 East, 177.

¹⁹⁰ *Hunt v. Taylor*, 108 Mass. 508.

¹⁹¹ *McCarty v. Barrow*, 2 Strange, 949; *Starey v. Barns*, 7 East, 435. But see *Brooks v. Rogers*, 1 H. Bl. 640.

¹⁹² *Howls v. Wiggins*, 4 Term R. 714.

¹⁹³ *Houle v. Baxter*, 3 East, 177.

¹⁹⁴ *Pine River Bank v. Swazey*, 47 N. H. 154. So, the assignor of a note with the name of one maker forged is not discharged by the discharge in

becomes bankrupt, and the note is proved against his estate, it will not bar an action against the maker.¹⁹⁵ If, however, the holder joins in a petition for the acceptor's discharge as an insolvent, without the consent of the drawer, he will release the drawer.¹⁹⁶ So, if the holder consents to receive satisfaction by an assignment of the maker for the benefit of creditors, it will discharge both maker and indorser.¹⁹⁷ But the discharge in insolvency of one joint maker will not bar an action against the other.¹⁹⁸ And the maker of a note will not be discharged by the discharge of a party for whose debt the note was given.¹⁹⁹

If a note is made by A. to B., and another note by B. to C., with A. as surety, and B. is discharged as a bankrupt, it will extinguish A.'s claim against him as surety, so far as it exceeds the amount of the first note held by B., but no further.²⁰⁰ And, in general, a set-off acquired in good faith by the maker of a note, against the payee, before the bankruptcy of the latter, and before notice of the transfer of the note, will not be defeated by the payee's bankruptcy.²⁰¹ If a bill is accepted payable at a particular bank, and is forwarded to it for collection and payment, and the bank fails before making payment, it will not be discharged from liability, but the owner may enforce the trust and recover the bill from its receiver.²⁰²

In Massachusetts provision is made by statute for waiver of a discharge in bankruptcy by a new promise.²⁰³

A discharge in insolvency or bankruptcy is confined, in general, to

insolvency of the genuine maker, and dividends received by the holder from his estate. *Spalding v. Gates* (Ky.) 41 S. W. 440.

¹⁹⁵ *Athol Nat. Bank v. Hingham Mfg. Co.*, 121 Mass. 399. And he may prove against several bankrupt parties, and have dividends from the estate of each. *Ex parte Wyldman*, 2 Ves. Sr. 113.

¹⁹⁶ *Lynch v. Reynolds*, 16 Johns. (N. Y.) 41.

¹⁹⁷ *Pontious v. Durlinger*, 59 Ind. 27.

¹⁹⁸ *Tooker v. Bennett*, 3 Calnes (N. Y.) 4. And this is provided by statute in CONNECTICUT (Gen. St. §§ 531, 1022).

¹⁹⁹ *Ricketts v. Harvey*, 78 Ind. 152.

²⁰⁰ *Scott v. Timberlake*, 83 N. C. 382.

²⁰¹ *Harwell v. Steel*, 17 Ala. 372.

²⁰² *Corn Exch. Bank v. Blye*, 2 N. Y. St. Rep. 112. And see § 1457, *supra*.

²⁰³ Pub. St. c. 78, § 3. But a part payment "as an installment of a long deferred promise" is not such a waiver. *Jacobs v. Carpenter*, 161 Mass. 16, 36 N. E. 676.

creditors who are necessarily or voluntarily within the jurisdiction.²⁰⁴ But if a creditor submits to the jurisdiction by proving his claim against the acceptor in a foreign bankruptcy proceeding, he will be bound by the discharge of the acceptor, and will also discharge the drawer, who did not consent or concur in the proceedings.²⁰⁵

Composition in Bankruptcy.

§ 1834. A composition in bankruptcy amounts to a release of the bankrupt;²⁰⁶ but it is not binding upon any party until executed by him;²⁰⁷ nor upon the bankrupt until he complies with its terms.²⁰⁸ When properly executed, a composition with one joint maker is a discharge of his co-maker.²⁰⁹ So, composition made with any party to a bill, without reserving the holder's rights against subsequent parties, will discharge them.²¹⁰ Composition made with the acceptor of a bill discharges the drawer.²¹¹ But if it is not a voluntary com-

²⁰⁴ *Kenworthy v. Hopkins*, 1 Johns. Cas. (N. Y.) 107. So, as to New York creditor of a foreign bankrupt, although the debt was contracted and payable in the foreign jurisdiction. *Phelps v. Borland*, 103 N. Y. 406, 9 N. E. 307. So, as to Massachusetts creditor of a foreign corporation discharged by Massachusetts insolvency proceedings, *Regina Flour-Mill Co. v. Holmes*, 156 Mass. 11, 30 N. E. 176; or as to a foreign creditor of a Massachusetts debtor pleading a discharge in Massachusetts, *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589, 24 N. E. 917. And see § 58, *supra*.

²⁰⁵ *Phelps v. Borland*, 103 N. Y. 406, 9 N. E. 307. But see *Id.*, 30 Hun. (N. Y.) 362.

²⁰⁶ *Steinman v. Magnus*, 11 East, 390; *Margetson v. Altken*, 3 Car. & P. 338; *Bissenger v. Gulteman*, 6 Helsk. (Tenn.) 277; *Grant v. Porter*, 63 N. H. 229. Although it reserves the holder's rights against the indorser. *Richardson v. Pierce*, 119 Mass. 165.

²⁰⁷ *Chitt. Bills*, 352; *Cranley v. Hillary*, 2 Maule & S. 120; *Oughton v. Trotter*, 2 Nev. & Man. 71; *Heathcote v. Crookshanks*, 2 Term R. 24. Although he had agreed to the composition, and afterwards withdrew his consent. *Fellows v. Stevens*, 24 Wend. (N. Y.) 294.

²⁰⁸ *National Mt. Wollaston Bank v. Porter*, 122 Mass. 308.

²⁰⁹ *Hall v. Wilcox*, 1 Moody & R. 58. And notwithstanding a reservation to the contrary. *Simpson v. Henning*, L. R. 10 Q. B. 406.

²¹⁰ *Ex parte Smith*, 3 Brown, Ch. 1; *Pannell v. McMeichen*, 4 Har. & J. (Md.) 474. But see *Schlingmann v. Fiedler*, 3 Mo. App. 577, *contra*.

²¹¹ *Ex parte Wilson*, 11 Ves. 410. So, if one who pays a bill *supra protest* joins in a petition for the discharge of an insolvent party, he will discharge

position, and is made by operation of law under the statute, the drawer will not be discharged, although the holder was present at the meeting of the acceptor's creditors and voted for the composition.²¹² If the holder enters into a composition with a drawer, for whose accommodation the bill has been accepted, he will discharge the accommodation acceptor.²¹³ In like manner, a composition with the maker will discharge an accommodation indorser, although he said that he would continue liable.²¹⁴

But where a composition with the principal debtor expressly reserves the holder's rights against the surety, the latter will not be discharged.²¹⁵ So, where it is made at the surety's request.²¹⁶ So, as to an indorser, who joins with the holder in signing the composition.²¹⁷ And after proof made in bankruptcy against co-sureties, one will not be discharged by a composition made with the other.²¹⁸ And a composition made by the holder with the payee, for whose accommodation the note was made, will not discharge such payee from liability to the accommodation maker (who was not a party to the composition), on his payment of the note.²¹⁹

the party honored by him, and such party paying the bill cannot recover against prior parties. *Lynch v. Reynolds*, 16 Johns. (N. Y.) 41.

²¹² *Ex parte Jacobs*, 10 Ch. App. 211.

²¹³ *Ex parte Glendinning*, Buck, 517.

²¹⁴ *Lewis v. Jones*, 4 Barn. & C. 506, 6 Dowl. & R. 567. But see, *contra*, where the maker signed for the payee's accommodation, *Mallet v. Thompson*, 5 Esp. 178; or where the right is expressly reserved, *Nichols v. Norris*, 3 Barn. & Adol. 41.

²¹⁵ *Bateson v. Gosling*, L. R. 7 C. P. 9.

²¹⁶ *Ex parte Harvey*, 4 De Gex, M. & G. 881.

²¹⁷ *Bruen v. Marquand*, 17 Johns. (N. Y.) 58; *Rockville Nat. Bank v. Holt*, 58 Conn. 528, 20 Atl. 660. But see, to the effect that an express agreement is necessary even in such case, *In re McDonald*, 14 N. B. R. 477, Fed. Cas. No. 8,753.

²¹⁸ *Ex parte Gifford*, 6 Ves. 805.

²¹⁹ *Thomas v. Liebke*, 81 Mo. 675, affirming 9 Mo. App. 424.

II. RELEASE AND SET-OFF.

§ 1835. Release—Consideration—Condition.

- 1836. — Form.
- 1837. — By Implication.
- 1838. — Collateral—Taken or Surrendered.
- 1839. — Agreement not to Sue.
- 1840. — Novation.
- 1841. — Surrender.
- 1842. — Of Execution.
- 1843. — How Extensive.
- 1844. — By Whom.
- 1846. — To Prior Party.
- 1848. — To Joint Debtor.
- 1849. Set-Off—Unliquidated Damages.
- 1850. — Breach of Warranty—Fraud.
- 1851. — Bill or Note.
- 1852. — Liability as Surety—Indorser.
- 1853. — Bank Notes.
- 1854. — Bank Deposits.
- 1855. — Acquired after Suit.
- 1856. — Against Insolvent.
- 1857. — Not Due.
- 1858. — Against Other Party.
- 1859. — Against Agent.
- 1860. — Against Trustee.
- 1861. — Against Administrator.
- 1862. — Against Joint Debtor.
- 1863. — Against Joint Creditor.
- 1864. — Against Partner—Husband and Wife—State.
- 1865. — Collateral—Judgment.

Consideration for Release—Condition.

§ 1835. An action may be barred by a formal release made by the holder to the party liable.²²⁰ And such release cannot be countermanded after it reaches the hands of a bona fide holder.²²¹ A valid consideration is necessary to a good release.²²² And in Pennsyl-

²²⁰ *Bauerman v. Radenius*, 7 Term R. 663.

²²¹ *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212.

²²² *Chit. Bills*, 350; *Story, Bills*, § 431; *Parker v. Leigh*, 2 Starkie, 228; *Weaver v. Fries*, 85 Ill. 356; *Smith v. Smith*, 80 Ind. 267. Thus, it is no release

vania a release is insufficient, if it is not under seal and does not express the consideration.²²³

An agreement to release an accommodation maker, if he would pay another note made by him, is without sufficient consideration, and will not be binding upon the holder, although the maker paid the other note, and neglected to take steps for his own security, because of the agreement.²²⁴ So, a part payment by the maker of a note is not sufficient consideration for a release.²²⁵ Nor is such payment by one joint maker sufficient to support a release or to discharge his co-maker.²²⁶ A note, however, made by one partner after dissolution of the firm, for half the partnership debt, has been held to be a sufficient consideration for a release of the maker, on the ground that such note may be a higher security than the original debt.²²⁷ And if the maker obtains the note of a third person, and the payee agrees to look to him, the original maker will be discharged.²²⁸ If an agreement is made upon a certain condition, to be performed by the maker, he will not be released without such performance.²²⁹ Thus, if it is conditioned on his paying interest until the payee's death, the burden is on him or his executor to prove that he did so.²³⁰

to agree without consideration to surrender the note at the maker's death, *Carrier v. Sears*, 4 Allen (Mass.) 336; or to surrender a collateral mortgage, *Richardson v. Noble*, 77 Me. 390; or "not to collect if the Confederacy fall," *Herndon v. Henderson*, 41 Miss. 584. But reliance on a promise to look to a collateral mortgage only, with damage resulting therefrom, is sufficient consideration. *First Nat. Bank v. Watkins*, 154 Mass. 385, 28 N. E. 275. If, however, it is an agreement to release in consideration of an executory promise (e. g. to pay an annuity), performance must be proved. *Harmon v. Adams*, 120 U. S. 363, 7 Sup. Ct. 553.

²²³ *Kidder v. Kidder*, 33 Pa. St. 268.

²²⁴ *Bragg v. Danielson*, 141 Mass. 195, 4 N. E. 622.

²²⁵ *Smith v. Bartholomew*, 1 Metc. (Mass.) 276.

²²⁶ *Llne v. Nelson*, 38 N. J. Law, 358; *Smith v. Bartholomew*, 1 Metc. (Mass.) 276.

²²⁷ *Ludington v. Bell*, 77 N. Y. 138, reversing 43 N. Y. Super. Ct. 557.

²²⁸ *Carpenter v. Murphree*, 49 Ala. 84.

²²⁹ *Whatcheer Bank v. Cushing*, 6 R. I. 303; *Collingwood v. Bank*, 15 Neb. 118, 17 N. W. 359.

²³⁰ *Harmon v. Adams*, 120 U. S. 363, 7 Sup. Ct. 553.

Form of Release.

§ 1836. It has been held that an express consent is necessary to effect the release of an acceptor.²³¹ The negotiable instrument law and the British bills of exchange act provide for renunciation in writing or by surrender of the bill.²³² And in Tennessee the release of a maker must be in writing, and cannot be proved by parol.²³³ And in Maine a seal has been held to be necessary.²³⁴ Where a note is given in consideration of an agreement to buy certain property, a sealed release of the agreement will discharge the note.²³⁵ So, even a verbal agreement to rescind the contract.²³⁶ And if a corporation takes a note for stock, payable in installments, and afterwards declares a forfeiture of the stock for nonpayment of an installment, it will release the maker from further liability on the note.²³⁷ If the payment of a note is assumed, upon good consideration, by an accommodation indorser, who covenants to indemnify the maker, the maker will be discharged.²³⁸ And if a note is payable "in current funds," and such funds are tendered by the maker, and refused, the indorser will be discharged.²³⁹ So, if payment of a joint judgment rendered against successive accommodation indorsers is tendered by the first indorser, and refused by the holder, it will discharge the second indorser.²⁴⁰

²³¹ Chit. Bills, 349; *Dingwall v. Dunster*, 1 Doug. 247; *Byrn v. Godfrey*, 4 Ves. 8.

²³² Negotiable Instruments Law (NEW YORK, § 203; COLORADO, CONNECTICUT, FLORIDA, and VIRGINIA, § 122; MARYLAND, § 141); Bills of Exchange Act, § 62. The British act applies to secured notes, *Francis v. Bruce*, 44 Ch. Div. 627; but is not satisfied by a direction in articulo mortis to destroy a lost note, when it should be found, *Id.*; nor by a surrender to the maker's devisee, *Edwards v. Walters* [1896] 2 Ch. 157.

²³³ *Simpson v. Moore*, 6 Baxt. 371. As to parol evidence of release, see *infra*.

²³⁴ *First Nat. Bank of Auburn v. Marshall*, 73 Me. 79.

²³⁵ *Barber v. Gordon*, 2 Root (Conn.) 96.

²³⁶ *Dearborn v. Cross*, 7 Cow. (N. Y.) 48.

²³⁷ *Ashton v. Burbank*, 2 Dill. 435, Fed. Cas. No. 582.

²³⁸ *In re Wilder*, 3 Fed. 859.

²³⁹ *Smith v. Bank*, 14 Pa. St. 525, notwithstanding the subsequent indorsement of a similar bill.

²⁴⁰ *Ewing v. Sugg*, 12 Lea (Tenn.) 376.

Implied Release.

§ 1837. A release of the acceptor may be implied from a promise to pay, indorsed on the bill by the drawer, but the effect of such promise is a question of intention, for the jury to determine.²⁴¹ The mere expression of an intention to release a party is not a release.²⁴² So, the acceptor will not be released by the holder saying, at a meeting of the acceptor's creditors, that he should look to the drawer, and not come upon the acceptor.²⁴³ So, it is not enough for the payee to agree, after maturity of the note, to sue the principal, with an admission that it would not be right to sue the surety.²⁴⁴ Mere neglect, however, on the holder's part, to call on the acceptor for payment, or mere indulgence to him, will not release the drawer.²⁴⁵ And the death of one joint maker, and subsequent receipt of interest from the survivor, will not release the deceased maker's estate.²⁴⁶

Collateral—Received or Surrendered.

§ 1838. Receiving collateral security from the maker of a note, without any special agreement, will not release him.²⁴⁷ So, if the holder takes security from an indorser, for whose accommodation the note was made, and agrees to proceed against the maker, his rights as indorsee will remain unaffected.²⁴⁸ And an indorser will not be discharged by the holder's taking collateral from the maker, and afterwards surrendering it.²⁴⁹ So, if the holder takes security

²⁴¹ *Ellis v. Galindo*, 1 Doug. 250.

²⁴² *Myers v. Malcom*, 20 Ill. 621.

²⁴³ *Whatley v. Tricker*, 1 Camp. 35. But it has been held to be sufficient if the purchaser, knowing the maker signed for the payee's accommodation, agrees with the maker to look to the payee only. *Daggett v. Whiting*, 35 Conn. 366.

²⁴⁴ *Hanchet v. Birge*, 12 Metc. (Mass.) 545.

²⁴⁵ *Chit. Bills*, 350; *Farquhar v. Southey*, *Moody & M.* 14, 2 Car. & P. 497; *Anderson v. Cleveland*, 13 East, 430, note, 1 Esp. 46.

²⁴⁶ *Hawk v. Johnson* (Pa. Sup.) 6 Atl. 725, 11 East. Rep. 16.

²⁴⁷ *South Sea Co. v. Duncomb*, 2 Strange, 919.

²⁴⁸ *National Bank of Republic v. Conlan*, 99 Mass. 181.

²⁴⁹ *Pitts v. Congdon*, 2 N. Y. 352.

from one joint maker or acceptor, he will not discharge the other.²⁵⁰ If land is conveyed to the payee to secure a note, the payee agreeing to reconvey it on payment of the note, the maker will be discharged by a subsequent devise of the land to him by the payee.²⁵¹ And if the holder surrenders collateral to the principal debtor, it will discharge the surety.²⁵² So, if he surrenders part of the collateral held by him, and negligently loses the rest.²⁵³ But if a guaranty is given to the acceptor, who is to be secured by a bill of lading, and the acceptor's agent applies the proceeds of the bill of lading, without fraud, and with the guarantor's knowledge, to other debts, the guarantor will not be released by such use of the collateral.²⁵⁴

Agreement not to Sue.

§ 1839. An agreement that the holder shall never sue an indorser is a bar to his subsequent action against him.²⁵⁵ So, too, a covenant never to sue, contained in a composition deed.²⁵⁶ On the other hand, a covenant not to sue for a certain time does not amount to a release.²⁵⁷ But where the holder agrees not to sue the acceptor,

²⁵⁰ *Evans v. Drummond*, 4 Esp. 89; *Thompson v. Percival*, 5 Barn. & Adol. 925, 3 Nev. & M. 107.

²⁵¹ *Holmes v. Holmes*, 36 Vt. 525.

²⁵² *Kirkpatrick v. Howk*, 80 Ill. 122. So, it will discharge the indorser of another collateral note, whose indorsement was obtained by fraud. *Haas v. Bank*, 41 Neb. 754, 60 N. W. 85. In California, where suit on a note secured by collateral mortgage must be by foreclosure of the mortgage, release of the mortgage will bar a suit on the note. *Hibernia Savings & Loan Soc. v. Thornton*, 109 Cal. 427, 42 Pac. 447. And see § —.

²⁵³ *Bank of Gettysburg v. Thompson*, 3 Grant, Cas. (Pa.) 114.

²⁵⁴ *Kidder v. Horrobin*, 72 N. Y. 159.

²⁵⁵ *Bruce v. Wright*, 3 Hun (N. Y.) 548. So, as to maker. *Simmons v. Thompson*, 29 App. Div. 559, 51 N. Y. Supp. 1018. Although merely verbal. *Pike v. Street, Moody & M.* 226. And a contemporaneous written agreement that the maker should not be personally responsible has the same effect. *Marletta Sav. Bank v. Janes*, 66 Ga. 286.

²⁵⁶ *Ellis v. McHenry*, L. R. 6 C. P. 229. Although it is not so if only made between the creditors of the maker. *Garnier v. Papin*, 30 Mo. 243.

²⁵⁷ *Bytes, Bills*, 244; *Thimbleby v. Barron*, 3 Mees. & W. 210. Unless expressed to be pleadable in bar. *Walker v. Neville*, 34 Law J. Exch. 73. Especially if it is merely in consideration of the maker's inability to pay. *Perkins v. Gilman*, 8 Pick. (Mass.) 229. But it may suspend the right of action for the time named. *Hutchins v. Nichols*, 10 Cush. (Mass.) 299.

if he will make affidavit that the acceptance is forged, his suit will be barred on the making of such affidavit.²⁵⁸ An agreement, however, not to sue one joint maker, on his payment of half the debt, until after endeavoring to collect the balance from the other maker, is without consideration, and will not bind the holder.²⁵⁹

A covenant with one maker never to sue him, with a reservation of all rights as to other parties, has been held not to be a release, but only to take effect as a covenant.²⁶⁰ And although damages are recoverable for breach of an agreement not to sue, it has been held that it cannot be pleaded in bar to the action.²⁶¹ A covenant not to sue one party is not a release of another party;²⁶² e. g. of a joint maker or acceptor.²⁶³ And a more formal release of a joint debtor may be construed, if so intended, as a mere covenant not to sue.²⁶⁴ So, a covenant made by one joint holder not to sue on a bill will not be a release of the rights of the others.²⁶⁵

Novation.

§ 1840. An agreement for novation by the substitution of a new debtor or the note of another party is a release of the original maker.²⁶⁶ So, where the note of two of three partners is taken on their assuming the debt for a valid consideration, it will be a release of the third.²⁶⁷ So, where the holder agrees to accept the liability of one of two joint makers, and release the other.²⁶⁸ If a novation of the debt is intended, it must be proved.²⁶⁹ And a mere promise

²⁵⁸ *Stevens v. Thacker*, Peake, 187.

²⁵⁹ *Pabodie v. King*, 12 Johns. 426.

²⁶⁰ *Kenworthy v. Sawyer*, 125 Mass. 28.

²⁶¹ *Smith v. Grabill*, 15 Ind. 267.

²⁶² *Henderson v. Stobart*, 5 Exch. 99.

²⁶³ *Bytes, Bills*, 243; *Chit. Bills*, 353; *Dean v. Newhall*, 8 Term R. 168; *Hutton v. Eyre*, 6 Taunt. 289.

²⁶⁴ *Bytes, Bills*, 243; *Chit. Bills*, 353; *Solly v. Forbes*, 2 Brod. & B. 38; *Willis v. De Castro*, 4 C. B. (N. S.) 216.

²⁶⁵ *Walmealey v. Cooper*, 11 Adol. & E. 216, 3 Perry & D. 149.

²⁶⁶ *McClellan v. Robe*, 93 Ind. 298. But see *Kelso v. Fleming*, 104 Ind. 180, 3 N. E. 830.

²⁶⁷ *Rusk v. Gray*, 83 Ind. 589.

²⁶⁸ *Lyon v. Aiken*, 70 Iowa, 16, 29 N. W. 785.

²⁶⁹ *Cockrill v. Johnson*, 28 Ark. 193.

to hold the maker of a new note is not sufficient.²⁷⁰ Where a partnership note is made to A., and one of the makers, on a dissolution of the firm, assumes its debts, with A. as security, to the other partner, and afterwards forms a partnership with A. to continue the business, it will not be a release of the firm from its liability on its note to A.²⁷¹ And where the acceptor of a bill given for coal purchased by the acceptor's company shows that the business of the company, and the coal in question, were turned over to another company, which agreed to pay the amount, and was charged by the seller with it, on his agreement to look to the new company, and not to the original debtor, it will be a sufficient defense, without showing that the plaintiff was a party to the agreement.²⁷²

Surrender of Instrument.

§ 1841. If the bill is surrendered by the holder to the maker, it is a sufficient release.²⁷³ So, if the first part is returned by the payee to the drawer on its nonacceptance, it will discharge the second part, in the hands of a holder with notice.²⁷⁴ Even a voluntary surrender of a bill without any consideration will amount to a release, if there is no fraud or mistake.²⁷⁵ So, a surrender in consideration merely of a part payment;²⁷⁶ or of a new note for a smaller amount;²⁷⁷ or by way of gift, without any consideration.²⁷⁸

²⁷⁰ *Clark v. Billings*, 59 Ind. 508.

²⁷¹ *Gulick v. Gulick*, 16 N. J. Law, 186.

²⁷² *Clay v. Turley*, 27 Law J. Exch. 2.

²⁷³ *Cooke v. Darwin*, 18 Beav. 60; *Sherman v. Sherman*, 3 Ind. 337. So, if the holder agrees to take off the surety's name, and let the note remain against the principal, and afterwards receives interest for several years from the principal, it will release the surety. *Taylor v. Lohman*, 74 Ind. 418. And a retransfer to the payee will discharge a maker who signed for the payee's accommodation. *Flagg v. Kirk*, 20 D. C. 335.

²⁷⁴ *Ingraham v. Gibbs*, 2 Dall. 134.

²⁷⁵ *Larkin v. Hardenbrook*, 90 N. Y. 333. But a cancellation by mistake will not discharge a note. *Steinhart v. Bank*, 94 Cal. 362, 29 Pac. 717.

²⁷⁶ *Stewart v. Hidden*, 13 Minn. 43 (Gil. 29). So, where the payee tore off one maker's name on receiving a partial payment from him. *Silvers v. Reynolds*, 17 N. J. Law, 275.

²⁷⁷ *Draper v. Hitt*, 43 Vt. 439.

²⁷⁸ *Young v. Power*, 41 Miss. 197. But it is not a sufficient plea that the

But a surrender to the maker for a limited time, and for a certain purpose, without any intention to release him, will not be a release.²⁷⁹ So, the surrender of a note to one maker, on an agreement for another note, to be executed by both, will not discharge either of them.²⁸⁰ So, if a note is surrendered after tender and refusal of Confederate currency, a receipt from the maker, in which he acknowledged his continued liability, and promised payment in other currency, will not amount to a release of the note.²⁸¹ So, if the surrender of the instrument is obtained by fraudulently concealing that the note given in renewal was a forgery;²⁸² or if it was made in fraud of creditors,²⁸³ or on receipt of other invalid securities.²⁸⁴

The cancellation or destruction of a bill by the holder, and with design, is a release. But if the holder tells his wife to burn a note, and she fails to do so, the maker will not be discharged.²⁸⁵ So, if the first indorser erases subsequent or secondary indorsements which are merely collateral, he will not discharge the maker thereby.²⁸⁶

Release of Execution.

§ 1842. Mere waiver of an execution against one party to a bill will not discharge other or subsequent parties.²⁸⁷ But if the holder

deceased holder "gave the note to the maker, and made arrangements to have it delivered up to him," if it was not done. *Henderson v. Henderson*, 21 Mo. 379. But it is sufficient if the payee, in her last sickness, gave the note to her sister for the maker, saying that the maker had boarded her, etc., although the sister neglected to surrender it to the maker. *Edwards v. Campbell*, 23 Barb. 423.

²⁷⁹ *Garlock v. Geortner*, 7 Wend. 198.

²⁸⁰ *Smith v. Awbrey*, 19 Ala. 63.

²⁸¹ *Lewis v. Davisson*, 29 Grat. 216.

²⁸² *Goodrich v. Tracy*, 43 Vt. 319. Even against a surety who was misled, like the holder, by the fraud. *Lovinger v. Bank*, 81 Ind. 354.

²⁸³ *Maine Mutual Marine Ins. Co. v. Pickering*, 66 Me. 130.

²⁸⁴ *Deyo v. Otoe Co.*, 37 Fed. 246.

²⁸⁵ *In re Campbell's Estate*, 7 Pa. St. 100.

²⁸⁶ *Morris v. Cude*, 57 Tex. 337.

²⁸⁷ *Byles, Bills*, 240; *Chit. Bills*, 611; *Pole v. Ford*, 2 Chlt. 125. But see remarks of Lord Eldon in *Mayhew v. Crickett*, 2 Swan. 190. And in Tennessee it is provided by statute that a stay of execution against the principal discharges the indorser or surety, if given without his consent. *Shannon's Code*, § 3522.

releases a levy against the maker's property, which is sufficient to satisfy the note, it will discharge the accommodation indorser.²⁸⁸ And if a judgment against the maker is set aside by agreement between the maker and holder, it will discharge the indorser only to the extent of the levy actually released.²⁸⁹ If property attached by the holder is released to an intervening claimant, it will discharge an indorser, where the claim was made by collusion, and might have been defeated.²⁹⁰ But where the holder of a note discharges the principal debtor from a ca. sa., with the consent of the guarantor, the latter will not be discharged.²⁹¹

Release Includes What.

§ 1843. Where the holder gives a sealed release of all debts, it cannot be shown by parol that it was not intended to include a bill.²⁹² The release of a bill or note discharges all collateral security.²⁹³ And an agreement not to sue except on future contracts will include a note which was indorsed before, but not taken up by the plaintiff until afterwards.²⁹⁴ Where one guaranties a note of B. & Co., and gives the payee an indemnity bond against all debts of B., and the bond is afterwards released by the payee, the release will not include the note of B. & Co., although it was given in part for a debt of B. which was covered by the bond.²⁹⁵ And where the holder of a bill gives a release in general terms, it will not include another bill of the same debtor, indorsed by the releasor, and held by a third party.²⁹⁶

In like manner, the release of a stockholder of the corporation

²⁸⁸ Priest v. Watson, 75 Mo. 310.

²⁸⁹ The burden of showing the extent being upon the holder. Pease v. Tilt, 9 Daly (N. Y.) 229.

²⁹⁰ Twiggs v. Bank (S. C.) 2 S. E. 398.

²⁹¹ Terrell v. Smith, 8 Conn. 426.

²⁹² Pierson v. Hooker, 3 Johns. (N. Y.) 68.

²⁹³ Byles, Bills, 244; Cowper v. Green, 7 Mees. & W. 633. But an extension which releases an indorser will not discharge him from a second note secured by same collateral. Hopkins v. Gray, 51 Iowa, 340, 1 N. W. 637.

²⁹⁴ Cuyler v. Cuyler, 2 Johns. (N. Y.) 186.

²⁹⁵ Davis Sewing-Mach. Co. v. Buckles, 89 Ill. 237.

²⁹⁶ Harry v. Wall, 2 Starkie, 195, 1 Barn. & Ald. 103. So, in a release of "all debts." Nichols v. Tracy, 1 Sandf. (N. Y.) 278. And see § 639, supra

(which made the note), *as indorser*, will not discharge him from his statutory liability *as stockholder*.²⁹⁷ Neither will a release by an indorser, stipulating "not to take advantage of the statute by which indorsers are released from liability after the first court," release the holder from laches in not suing the maker for three years, and until he had become insolvent.²⁹⁸ Where the president of a bank indorses a bill in its name, in excess of the statutory limit of amount, he will not be discharged from liability for the consideration by the release of a prior accommodation indorser, with the consent of the bank.²⁹⁹

Release—By Whom Given.

§ 1844. A release by any party will be good between the parties to it, although the releasor is not at the time the holder.³⁰⁰ But, to affect other parties, the release must be by the holder.³⁰¹ A guardian has no power to release a note made to him, as such, and take new and worthless securities for it.³⁰² But an agent, taking a note and holding it for his principal, may release the maker, and the principal will be estopped from denying his authority to do so.³⁰³ On the other hand, a mere collecting agent in possession of a note cannot question the owner's right to release him.³⁰⁴

If the payee of a note secured by mortgage releases the mortgage after transferring the note, the indorsee of the note will not be bound by such release.³⁰⁵ And, even where a collateral mortgage is given

²⁹⁷ First Nat. Bank of Barre v. Hingham Mfg. Co., 127 Mass. 563.

²⁹⁸ Foster v. Stafford, 14 Ala. 714.

²⁹⁹ Brannin v. Loving, 82 Ky. 370.

³⁰⁰ Byles, Bills, 242; Chit. Bills, 352; Scott v. Lifford, 1 Camp. 246, 9 East, 347.

³⁰¹ E. g. an accommodation indorser setting up the release of a prior party. Armstrong v. Lewis, 61 Ga. 680.

³⁰² Smith v. Dibrell, 31 Tex. 239.

³⁰³ West Boylston Mfg. Co. v. Searle, 15 Pick (Mass.) 225. But an attorney has no power to covenant not to sue, if collateral received prove sufficient. Bradford v. Arnold, 33 Tex. 412. And see § 369, supra, as to the authority of a corporate officer.

³⁰⁴ Flanagan v. Brown, 70 Cal. 254, 11 Pac. 706.

³⁰⁵ Keohane v. Smith, 97 Ill. 156; McCracken v. Insurance Co., 43 Md. 471; Dewing v. Crueger, 7 Wash. 590, 35 Pac. 393. Although the releasor supposed the notes had been paid. Martindale v. Burch, 57 Iowa, 291, 10 N. W.

to indemnify an accommodation indorser, it has been held to inure in equity to the benefit of the holder, so that it cannot be released by the indorser.³⁰⁶ But if a mortgage secures several notes, and one of them is transferred by the payee to A., and the mortgage is afterwards released by the payee, without A.'s knowledge, and the property sold to a purchaser without notice, A. will be estopped from denying the release, after allowing the mortgagee to retain legal title and control of the mortgage.³⁰⁷

If a note is made to a partnership, A. & B., and A. agrees with the maker to take up the note on a sale of lumber by the maker to the firm, it will not amount to a release of the maker by the firm.³⁰⁸ And a member of an insolvent firm cannot credit his individual indebtedness to the maker, on a note held by the firm, as against the creditors of the firm.³⁰⁹ Where a note is transferred, however, before its maturity, fraudulently, to avoid a defense, the payee will be bound by a release executed by his indorsee.³¹⁰

§ 1845. It is no defense to an action, brought by the holder of a check, that a settlement had been made between the drawee and the bankrupt drawer.³¹¹ And, in general, a release made by an indorser will not bind his indorsee.³¹² So, a release by the payee of a nonnegotiable duebill or draft will not (as against his assignee) discharge the maker, if he has notice of the transfer.³¹³ In like manner, the pledgee of a note will not be bound by a release by the pledgor to the maker,

670. Unless the mortgage was made only for his personal indemnity. *Hartford & N. Y. Transp. Co. v. First Nat. Bank of Hartford*, 46 Conn. 569.

³⁰⁶ *Dick v. Mawry*, 9 Smedes & M. (Miss.) 448.

³⁰⁷ *Swartz v. Leist*, 13 Ohio St. 419.

³⁰⁸ *Lewis v. Westover*, 29 Mich. 14. See, too, *Webber v. Alderman*, 102 Mich. 638, 61 N. W. 57.

³⁰⁹ *Mayer v. Garber*, 53 Iowa, 689, 6 N. W. 63.

³¹⁰ *Atkinson v. Runnells*, 60 Me. 440.

³¹¹ *State Sav. Ass'n v. Boatmen's Sav. Bank*, 11 Mo. App. 292.

³¹² *Butler v. Chapin*, 28 Ill. 230. Especially after notice to the maker of the transfer, *Russel v. Cornwell*, 2 Root (Conn.) 122. And although the latter did not take up the note until afterwards. *Brown v. Williams*, 4 Wend. (N. Y.) 360. And by statute such release is of no effect as against the owner in DELAWARE (Rev. Code, c. 63, § 8).

³¹³ *Kimball v. Huntington*, 10 Wend. (N. Y.) 675. And the good faith of such release is a question for the jury. *Stevens v. Parker*, 3 Allen (Mass.) 256.

where the maker has notice of the pledge.³¹⁴ And if the maker of a note pays part of the amount to his indorsee, on his agreement not to bring suit against him for the balance, and a judgment is afterwards obtained, and levy made by the indorsee against the indorser, and subsequently assigned to a third party, who agreed to obtain a discharge for the maker, it will not prevent the indorser from recovering against the maker the amount paid by him on such judgment.³¹⁵ And if the holder discharges the acceptor from a ca. sa., the release cannot be set up against the purchaser, who took the bill after maturity, from an indorser who took it up before the release was given.³¹⁶

Release to Prior Party.

§ 1846. A release given to the drawee before he has accepted the bill, or incurred any liability, is of no effect.³¹⁷ So, the release of an insolvent maker before maturity will not discharge either the maker or indorser from his contingent liability to a bona fide purchaser who holds the note at maturity.³¹⁸ If the holder releases the maker, he will thereby discharge an intermediate accommodation indorser.³¹⁹ But his release of the maker's real property from execution will not be an absolute discharge of an accommodation indorser.³²⁰ And a release given to the maker without any consideration is of no effect, and will not discharge the indorser.³²¹ A valid release to an indorser releases subsequent indorsers,³²² but not prior parties.³²³ And even

³¹⁴ *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34.

³¹⁵ *Nichols v. Holt*, 9 Gray (Mass.) 202.

³¹⁶ *Woodward v. Pell*, L. R. 4 Q. B. 55.

³¹⁷ *Byles*, Bills, 243; *Chit. Bills*, 351; *Drage v. Netter*, 1 Ld. Raym. 65; *Hartley v. Manton*, 5 Q. B. 247. But release of acceptor discharges drawer. *First Nat. Bank v. Day*, 64 Iowa, 118, 19 N. W. 882.

³¹⁸ *Keeler v. Bartine*, 12 Wend. (N. Y.) 110.

³¹⁹ *In re Wilder*, 3 Fed. 859. And see § 769, *supra*.

³²⁰ *Dunn v. Parsons*, 40 Hun (N. Y.) 77. And the release from execution of the bankrupt maker, as a fraudulent preference under the statute, will not release the indorser, although it bars the holder's proof of claim against the maker. *Streeter v. Bank*, 147 U. S. 37, 13 Sup. Ct. 236.

³²¹ *Crawford v. Millspaugh*, 13 Johns. (N. Y.) 87; *Hutchins v. Nichols*, 10 Cush. (Mass.) 299.

³²² *Newcomb v. Raynor*, 21 Wend. (N. Y.) 108; *Brewer v. Boynton*, 71 Mich. 254, 30 N. W. 49.

³²³ *Bank of Kentucky v. Floyd*, 4 Metc. (Ky.) 159.

a release to the payee and indorser, for whose accommodation the note was made, will not discharge the maker, if his accommodation character is not known to the holder.³²⁴

§ 1847. — If collateral is surrendered to the principal debtor without the knowledge of his surety (the accommodation maker), the latter will be discharged pro tanto, if the real relation of the party is known to the releasor.³²⁵ So, the drawer of a bill will be discharged by a release of the acceptor.³²⁶ But an acceptor will not be discharged by a release to the drawer, although he has overestimated the value of the consignment on the strength of which he accepted the bill.³²⁷ An accommodation acceptor will be discharged, however, if the holder knowingly receives another bill from the drawer, and agrees not to sue on the original bill, if the latter is paid.³²⁸ But a release of the drawer will not discharge subsequent parties, if it contains an express reservation of all other rights of the holder.³²⁹

Release to Joint Debtor.

§ 1848. A release to one joint maker,³³⁰ or even to one joint and several drawer or maker, in general, releases all.³³¹ And where a

³²⁴ *Carstairs v. Rolleston*, 5 Taunt. 551, 1 Marsh. C. P. 207; *First Nat. Bank of Auburn v. Marshall*, 73 Me. 79. But see, contra, where his character is known, *Flour City Nat. Bank of Rochester v. McKay*, 86 Hun, 15, 33 N. Y. Supp. 365.

³²⁵ *Guild v. Butler*, 127 Mass. 386, although the contrary was held in a former trial, on proof that the holder's knowledge of the release of the parties was obtained before the release, but after he purchased the note. *Id.*, 122 Mass. 498. As to the effect on a surety of the release of his principal, see § 940 et seq., supra.

³²⁶ Unless the bill was drawn without funds. *Sargent v. Appleton*, 6 Mass. 85. Notwithstanding an express reservation of the drawer's lien on certain property of the acceptor. *First Nat. Bank of Decorah v. Day*, 64 Iowa, 118, 19 N. W. 882.

³²⁷ *Farmers' & Mechanics' Bank v. Rathbone*, 26 Vt. 19.

³²⁸ *Overend, Gurney & Co. v. Oriental Financial Corp.*, L. R. 7 H. L. 348.

³²⁹ *Muir v. Crawford*, L. R. 2 H. L. Sc. 456; *Stewart v. Eden*, 2 Caines (N. Y.) 121; *First Nat. Bank of Auburn v. Marshall*, 73 Me. 79. And see § 770, supra.

³³⁰ *Maslin's Ex'rs v. Hiett*, 37 W. Va. 15, 16 S. E. 437. But not a release to an infant maker after his repudiation of the contract on coming of age. *Young v. Currier*, 63 N. H. 419.

³³¹ *Byles, Bills*, 243; *Chit. Bills*, 353; *Nicholson v. Revill*, 4 Adol. & E. 675,

joint and several note is taken in payment of the several liabilities of the makers, and one maker is afterwards released, it will revive the original liabilities for which the note was given.³³² But a release of one joint maker will not discharge his co-maker from a several mortgage and covenant made by him as collateral.³³³ The release of a surety will discharge his co-surety.³³⁴

But the effect of releasing a joint debtor may be restricted by the bill itself;³³⁵ or by a recital or reservation in the release.³³⁶ A formal release cannot, however, be defeated by a verbal agreement of different purport.³³⁷ And the release of one joint maker, on his paying part of a note, has been held to be without consideration, and of no effect as a discharge of his co-maker.³³⁸ So, an agreement, in consideration of part payment, that the holder should not sue one of the makers, but should sue the others for the joint debt of all.³³⁹ And if the holder releases an infant joint maker, after he had already disaffirmed the contract, it will not discharge his co-maker.³⁴⁰

In Vermont, the statute provides expressly for a release of one joint maker without discharge of the other.³⁴¹ And, in Virginia, this is the case, except that the other debtors are released to the extent of the share of the party released.³⁴² In Tennessee, such re-

6 Nev. & M. 102; *Knox v. Keweenaw*, 2 Kay & J. 174; *Crawford v. Roberts*, 5 Cr. 324; *Hatchmark v. Roberts*, 16 Cr. 263 26 Pac. 518. But see, *North v. North*, 10 Mo. 402 27 Ill. 471. So where the note is several only. *Clark v. M. Co.*, 18 Ind. 322 13 N. E. 100.

³³² *Clark v. M. Co.*, 18 Ind. 322 13 N. E. 100.

³³³ *Clark v. M. Co.*, 18 Ind. 322 13 N. E. 100.

³³⁴ *Clark v. M. Co.*, 18 Ind. 322 13 N. E. 100.

³³⁵ *Clark v. M. Co.*, 18 Ind. 322 13 N. E. 100; *Cocks v. Nash*, 9 N. & M. 102; *Proctor v. Proctor*, 4 N. & M. 70.

³³⁶ *Proctor v. Proctor*, 4 N. & M. 70; *Sturges v. Johnson*, 3 Barn. & Ald. 173; *Sturges v. Johnson*, 22 Pr. 2. Also 33.

³³⁷ *Sturges v. Johnson*, 22 Pr. 2; *Sturges v. Johnson*, 22 Pr. 2. Also 33.

³³⁸ *Sturges v. Johnson*, 22 Pr. 2; *Sturges v. Johnson*, 22 Pr. 2. Also 33.

³³⁹ *Sturges v. Johnson*, 22 Pr. 2; *Sturges v. Johnson*, 22 Pr. 2. Also 33.

³⁴⁰ *Sturges v. Johnson*, 22 Pr. 2; *Sturges v. Johnson*, 22 Pr. 2. Also 33.

³⁴¹ *Sturges v. Johnson*, 22 Pr. 2; *Sturges v. Johnson*, 22 Pr. 2. Also 33.

³⁴² *Sturges v. Johnson*, 22 Pr. 2; *Sturges v. Johnson*, 22 Pr. 2. Also 33.

lease is made a question of intention, and it must appear that the other parties consented, and agreed to be liable for the whole debt.³⁴³

Set-Off—Unliquidated Damages.

§ 1849. In general, only ascertained money demands can be used by the defendant as a set-off.³⁴⁴ If the set-off proved exceeds the plaintiff's demand, judgment may be rendered for the excess in the defendant's favor, where it would be recoverable in an action between the same parties.³⁴⁵ But unliquidated damages, although arising *ex contractu*, cannot be set off.³⁴⁶ So, a fortiori, damages recoverable in an action of tort, such as trespass or trover;³⁴⁷ or resulting from the plaintiff's negligence.³⁴⁸ But unliquidated damages, arising even out of another contract, may be set up in equity,

³⁴³ *Richardson v. McLemore*, 5 Baxt. 586.

³⁴⁴ *Byles, Bills*, 367; 2 Pars. Notes & B. 605; *Collins v. Collins*, 2 Burrows, 820; *Lee v. Lester*, 7 C. B. 1008. For American statutes as to set-off see § 1882, *infra*.

³⁴⁵ *Chit. Bills*, 681; *Tuck v. Tuck*, 5 Mees. & W. 109; *Moore v. Butlin*, 7 Adol. & E. 595, 2 Nev. & P. 436. This is now regulated by statute in most of the states.

³⁴⁶ *Loring v. Otis*, 7 Gray (Mass.) 563; *Pitts v. Holmes*, 10 Cush. (Mass.) 92; *Mahan v. Ross*, 18 Mo. 121; *Pratt v. Menkens*, Id. 158; *Smith v. Smith*, 1 Ind. 476; *West v. Hayes*, 104 Ind. 251, 3 N. E. 932; *McSmithee v. Feamster*, 4 W. Va. 673; *Bolinger v. Gordon*, 11 Humph. (Tenn.) 61; *Moore v. Weir*, 3 Sneed (Tenn.) 46; *McCord v. Williams*, 2 Ala. 71. But see, *contra*, *Phillips v. Lawrence*, 6 Watts & S. (Pa.) 150; *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15.

³⁴⁷ *Schweizer v. Weiber*, 6 Rich. Law, 159; *Central Ohio R. Co. v. Thompson*, 2 Bond, 296, Fed. Cas. No. 2,550; *Griffin v. Lawton*, 54 Ga. 104; *Clause v. Press Co.*, 118 Ill. 612, 9 N. E. 201; *Blue v. Bank*, 145 Ind. 518, 43 N. E. 655; *First Nat. Bank of Arkansas City v. Hasle*, 57 Kan. 754, 48 Pac. 22; *Riddle v. McKinney*, 67 Tex. 29, 2 S. W. 748. But damages for the conversion by the plaintiff of the note sued upon may be set off. *Gunn's Adm'r v. Todd*, 21 Mo. 303. And, in a suit for penalties under the usury provision of the National Bank Act, the defendant may set off exchange, expenses, and other debts. *Barrett v. Bank*, 20 Cent. Law J. 133. In an action for the conversion of a note, however, an account cannot be set off. *Keaggy v. Hite*, 12 Ill. 99.

³⁴⁸ Either in presenting the bill, *Harrison v. Wortham*, 8 Leigh (Va.) 296; or preserving the collateral deposited, *Winthrop Sav. Bank v. Jackson*, 67 Me. 570; or insuring the premises mortgaged as collateral, according to agreement, *Brighton Five Cents Sav. Bank v. Sawyer*, 132 Mass. 185; or in another mat-

where the claim set off was acquired before notice of transfer of the bill.³⁴⁹

In like manner, damages arising out of the contract, by way of failure of consideration of the note, may be set off or recouped.³⁵⁰ If, however, a note is given for the purchase of a machine, the breach of a subsequent promise by the agent to repair it cannot be set off.³⁵¹ So, a note given for a loss on an insurance policy cannot be set off against the premium in the hands of an indorsee.³⁵² A bill for services by the defendant to the plaintiff may, however, be set off;³⁵³ or an open account in favor of a third party, transferred to the defendant.³⁵⁴ So, an agreement, for valid consideration, to pay the debt of a third party to the defendant, may be set off.³⁵⁵ So, a call by the maker of a corporation note, for the payment of an assessment on stock held by the payee.³⁵⁶ But a bank cannot set up dividends accrued on bank stock of an insolvent and deceased stockholder, against his indorsement held by the bank.³⁵⁷

ter in which he acted as agent for the defendant, *Brake v. Corning*, 19 Mo. 125.

³⁴⁹ *Wray v. Furniss*, 27 Ala. 471.

³⁵⁰ *Stacy v. Kemp*, 97 Mass. 166; *Hill v. Southwick*, 9 R. I. 299; *Hubler v. Tamney*, 5 Watts (Pa.) 51. So, for negligence in shipment of goods, the note being for advances made on them. *Foster v. Bush*, 104 Ala. 662, 16 South. 625. So, for breach of agreement to allow the wood, for which the note was given, to be made into charcoal on the vendor's land. *Harman v. Bannon*, 71 Md. 424, 18 Atl. 862. So, as to good will of a business, for which the note was given. *Snow v. Holmes*, 71 Cal. 142, 11 Pac. 856. But not to correct a note given in a partnership settlement on account of property misappropriated by one partner, which he promised to pay for. *Johnson v. Wilson*, 54 Ill. 419.

³⁵¹ *Buntain v. Dutton*, 21 Ill. 190.

³⁵² *Union Ins. Co. v. Greenleaf*, 64 Me. 123.

³⁵³ *Harrison v. Turner*, 10 Q. B. 482; *Briggs v. Moore*, 14 Ala. 433; *Hubbard v. Fisher*, 25 Vt. 539.

³⁵⁴ *Ashby v. Carr*, 40 Miss. 64. But an account held by the defendant may be confined by the plaintiff as a set-off to his account against the defendant in an action brought by him on the note only. *Blount v. Rick*, 107 Ind. 238, 5 N. E. 898, and 8 N. E. 108.

³⁵⁵ Although the defendant's note was given afterwards, and was prima facie a settlement of previous indebtedness. *Graves v. Shulman*, 59 Ala. 406.

³⁵⁶ *Carralli Claim*, 4 Ch. App. 174.

³⁵⁷ *Brent v. Bank*, 2 Cranch, C. C. 517, Fed. Cas. No. 1,834.

Breach of Warranty—Fraud.

§ 1850. Where a note is given for a purchase of land with a warranty deed, money paid by the maker to clear it of incumbrances may be recouped.³⁵⁸ And damages arising from a breach of warranty may be set off by the maker, even though the note was given with knowledge of such breach, but on the payee's promise to remedy the defect.³⁵⁹ In general, the maker of a note cannot recoup damages for misrepresentation as to the quantity or quality of the land sold.³⁶⁰ But if several notes are given for the purchase of land with a warranty deed, a prior incumbrance paid off by the maker may be set off against the last note;³⁶¹ or may be applied pro rata against the several notes, and not to any one for the purpose of exonerating the surety on that one.³⁶² Where goods are sold with a warranty, a breach of the warranty, with or without fraud, may be set off by the purchaser against the note.³⁶³ But an accommodation indorser cannot set up such breach of warranty by the payee to the maker, the election to do so resting with his principal.³⁶⁴

If the discount of a note for the maker is obtained by his fraud,

³⁵⁸ *Davis v. Bean*, 114 Mass. 358; *Packwood v. Gridley*, 39 Ill. 388; *Holley v. Younge*, 27 Ala. 208. Provided the damages can be assessed by simple computation. *Drew v. Towle*, 27 N. H. 412.

³⁵⁹ *Aultman v. Hefner*, 67 Tex. 54.

³⁶⁰ *Gordan v. Parmelee*, 2 Allen (Mass.) 212. But see *Pierce v. Tiersch*, 40 Ohio St. 168.

³⁶¹ *Stilwell v. Chappell*, 30 Ind. 72. And will not be allowed as set-off in excess of the particular note in suit, before the others have matured, unless it is shown that the others have been transferred. *Aultman v. Jett*, 42 Wis. 488; *Aultman v. Hetherington*, Id. 622.

³⁶² *Franklin Bank v. Cooper*, 36 Me. 221.

³⁶³ *Wentworth v. Dows*, 117 Mass. 15; *Mills v. Rosenbaum*, 103 Ind. 152, 2 N. E. 313; *Wheelock v. Berkeley*, 138 Ill. 153, 27 N. E. 942; *Rugland v. Thompson*, 48 Minn. 539, 51 N. W. 604; *Phoenix Iron-Works Co. v. Rhea* (Tenn. Ch. App.) 38 S. W. 1079; *Loring v. Morrison*, 15 App. Div. 498, 44 N. Y. Supp. 526. But, to the effect that such defense is failure of consideration, and not set-off, see *Stockton Savings & Loan Soc. v. Gidings*, 96 Cal. 84, 30 Pac. 1016.

³⁶⁴ *Hiner v. Newton*, 30 Wis. 640. Especially at the suit of a bona fide purchaser before maturity. *Mable v. Johnson*, 8 Hun (N. Y.) 309. Though equity might protect a surety against an insolvent principal. *Gillespie v. Torrance*, 25 N. Y. 306.

such fraud may be set off by the discounting bank, on the maker's implied agreement, against subsequent deposits.³⁶⁵ But fraud in the transfer of a sealed bill is not, in general, a matter of set-off;³⁶⁶ nor any unliquidated damages arising *ex delicto*.³⁶⁷ But where a note is secured by chattel mortgage, and the property is afterwards sold by the payee, in violation of his agreement, and in fraud of the maker, the maker may set up such fraud as an equitable defense, entitling him to redeem the property on payment of the amount secured.³⁶⁸

Bill or Note as Set-Off.

§ 1851. The plaintiff's own note may be set off in an action against him on another contract;³⁶⁹ but not if the consideration of the note failed, and this was known to the defendant when he purchased it.³⁷⁰ So, he cannot set up a bill or note, which has been transferred to him conditionally, to be used as a set-off and accounted for, or to be returned to the indorser.³⁷¹ So, he cannot set up a note transferred by mere delivery, where an indorsement would be necessary to support a suit on it in his own name.³⁷² And, even at suit of a purchaser after maturity, the maker's administrator can-

³⁶⁵ *Andrews v. Bank*, 26 N. Y. 298.

³⁶⁶ *Dilts v. Trimmer*, 3 N. J. Law, 951.

³⁶⁷ *Pulliam v. Owen*, 25 Ala. 492. But see *Cato v. Phillips*, 28 Tex. 101, if the tort is waived.

³⁶⁸ *Boyd v. Beaudin*, 54 Wis. 193, 11 N. W. 521.

³⁶⁹ *Stettinus v. Myer*, 4 Cranch, C. C. 349, Fed. Cas. No. 13,385; or the payee's note given in exchange for the note in suit, *Rice v. Grange*, 131 N. Y. 149, 30 N. E. 46; or even a debt represented by a note which is void for duress, *Bunnell v. Butler*, 23 Conn. 65. But, under the Massachusetts statute (Gen. St. c. 53, § 10) providing for the set-off of note, the certificate of deposit of a national bank is held not to be a note, and not to be subject to the set-off of a note of the payee in the hands of the bank. *Shute v. Bank*, 136 Mass. 487.

³⁷⁰ *Messmore v. Larson*, 86 Ill. 268.

³⁷¹ *Adams v. McGrew*, 2 Ala. 675; *Atkins v. Knight*, 46 Ala. 539; *McDade v. Mead*, 18 Ala. 214; *Proctor v. Cole*, 104 Ind. 373, 4 N. E. 308. But see *Moise v. Chapman*, 24 Ga. 249.

³⁷² *Ayres v. McConnel*, 15 Ill. 230; *Trow v. Braley*, 56 Vt. 560. But see, contra, as to a note, *Hickerson v. McFaddin*, 1 Swan (Tenn.) 258. And as to a sealed bill not payable to order, but assigned to the defendant before suit brought, *Sheppard v. Stites*, 7 N. J. Law, 90.

not set up a note transferred to the maker in his lifetime, without indorsement.³⁷³ A set-off by note is subject, like any right of action, to the bar of the statute of limitations;³⁷⁴ or it may be barred by such laches (e. g. in presenting it to an administrator for allowance) as would defeat a recovery upon it.³⁷⁵ So, the maker of a note cannot set up, against the holder, a check held by him, drawn upon, but not accepted by, the holder of the note;³⁷⁶ although, where the drawee of a check is liable to the holder without acceptance, the contrary would no doubt be held.

Liability as Surety—Indorser.

§ 1852. An open guaranty held by the defendant against the plaintiff is not a subject of set-off, at common law.³⁷⁷ So, he cannot set off the plaintiff's contingent liability to him as a surety.³⁷⁸ But the liability of an indorser on a note already overdue is fixed, and may be set off;³⁷⁹ although it is otherwise if the note is not yet due, and the liability is still contingent.³⁸⁰

Where the drawer of a protested bill has paid the statutory damages, he cannot use such payment as a set-off against the acceptor, in an action brought on another account, such damages being still unliquidated, as regards the liability of the acceptor.³⁸¹ But where

³⁷³ *Stickney v. Clement*, 7 Gray (Mass.) 170.

³⁷⁴ *Lyon v. Petty*, 65 Cal. 322, 4 Pac. 103; *Harwell v. Steel*, 17 Ala. 372. And the set-off may be barred, and the note (an attested note) not barred. *Nason v. McCulloch*, 31 Me. 158.

³⁷⁵ *Lyon v. Petty*, 65 Cal. 322, 4 Pac. 103.

³⁷⁶ *Case v. Henderson*, 23 La. Ann. 49; *Case v. Marchand*, Id. 60.

³⁷⁷ *Bytes, Bills*, 367; *Crawford v. Stirling*, 4 Esp. 207; *Morley v. Inglis*, 4 Bing. N. C. 58, 5 Scott, 314. So, where the guarantor became insolvent before the maturity of the notes which were guarantied. *Mechanics' Bank v. Stone* (Mich.) 74 N. W. 204.

³⁷⁸ *Wood v. Steele*, 65 Ala. 436; *Houghton v. Houghton*, 37 Me. 72; *Houghton v. Fellows*, 27 Vt. 634; *Lamb v. Pannell*, 28 W. Va. 663. But an accommodation indorser before he has paid the note of the insolvent maker may retain as security the maker's funds then in his hands. *Citizens' Bank v. Kendrick*, 92 Tenn. 437, 21 S. W. 1070.

³⁷⁹ *Pease v. Turner*, 3 How. (Miss.) 375. But not in suit against an insolvent indorser. *Walker v. Wigginton*, 50 Ala. 579.

³⁸⁰ *Hotchkiss v. Roehm*, 181 Pa. St. 65, 37 Atl. 119.

³⁸¹ *Armstrong v. Brown*, 1 Wash. C. C. 43, Fed. Cas. No. 542.

the defendant has been obliged, as acceptor, to pay a former draft of the plaintiff to a bona fide holder, after he had been released by the plaintiff, it will be a good set-off.³³²

Payment made by a surety, even after the principal's insolvency, may be set up against his assignee.³³³ So, the right of contribution among joint-makers, for payment by one maker, against the assignee of a co-maker.³³⁴

Bank Notes—Set-Off.

§ 1853. Where suit is brought by a bank of issue, it is obliged to receive its own notes in payment, and such notes may be set off against it.³³⁵ And if it has agreed, on taking the note of A. for its bank bills, to redeem its bills within a limited time, a tender of the bills within such time is a good defense by way of counterclaim, and not as a failure of consideration.³³⁶ And the maker of a bond to the bank may set up, against a purchaser of the bond, the notes of the bank held by the maker before notice to him of the transfer of the bond.³³⁷

The bills of a bank may be set up against a note held by it, notwithstanding an assignment of the note for the benefit of creditors.³³⁸ But, in Connecticut, the receiver of an insolvent bank suing upon a note has been held not to be subject to a set-off of the notes of the bank, although acquired before suit, and before the insolvency of the bank.³³⁹

In Georgia, however, under the statute, the notes of an insolvent bank are available as a set-off in an action brought by the receiver, whether obtained before or after the insolvency, or before or after suit brought, and under whatever agreement, or for whatever con-

³³² Cannon v. Campbell, 69 Ga. 263.

³³³ Merwin v. Austin, 58 Conn. 22, 18 Atl. 1029. As to set-off of the principal debtor pleaded by the surety, see § 923, supra.

³³⁴ Chenault v. Bush, 84 Ky. 523, 2 S. W. 160.

³³⁵ Niagara Bank v. Rosevelt, 9 Cow. (N. Y.) 409. Although not payable at a particular place, and without any previous demand. Bank of Niagara v. McCracken, 18 Johns. (N. Y.) 493; Coxe v. Bank, 8 N. J. Law, 172.

³³⁶ Racine Co. Bank v. Keep, 13 Wis. 209.

³³⁷ Northampton Bank v. Balliet, 8 Watts & S. (Pa.) 311.

³³⁸ Blount v. Windley, 68 N. C. 1.

³³⁹ Eastern Bank v. Capron, 22 Conn. 639.

sideration obtained.³⁹⁰ But, in New York, the notes of a bank cannot be set up in an action by the receiver upon a note falling due after his appointment.³⁹¹ So, in Rhode Island, if the bank notes were purchased after the bank became insolvent, at a considerable discount, and by one who is a director of the bank.³⁹²

Bank Deposits—Set-Off.

§ 1854. A bank has a banker's lien on deposits for general balances, notwithstanding the insolvency of the depositor.³⁹³ Thus, a judgment in its favor on a note made by the depositor may be set off in an action brought to recover the deposit.³⁹⁴ But the indorser of a check, in a suit brought by his indorsee, cannot have the insolvent drawer's deposit with the indorsee set off in his favor.³⁹⁵ Where a bank discounts a draft for the drawer, it has a lien on the proceeds in its hands as a deposit, even against an assignee of the fund.³⁹⁶ But it has been held that it cannot apply the maker's deposit to the payment of a note which became due after his insolvency;³⁹⁷ nor to an overdue note not charged up until after a check of the maker had been presented and refused payment.³⁹⁸

If the bank becomes insolvent, the maker's deposit at the time of such insolvency forms a good set-off against a note then held by it³⁹⁹ or its pledgee.⁴⁰⁰ But a general deposit in an insolvent sav-

³⁹⁰ *Molse v. Chapman*, 24 Ga. 249.

³⁹¹ *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13. And see § 1404, supra.

³⁹² *Clarke v. Hawkins*, 5 R. I. 219.

³⁹³ *Davis v. Bowsher*, 5 Term R. 488.

³⁹⁴ *Marsh v. Bank*, 34 Barb. (N. Y.) 298. So, the note of a maker who dies insolvent may be set off against his deposit with the holder. *Ford's Adm'r v. Thornton*, 3 Leigh (Va.) 695.

³⁹⁵ *Union Nat. Bank v. Cannonburgh Iron Co.* (Pa. Sup.) 6 Atl. 577, 23 Cent. Law J. 526. But see *People's Bank of Wilkesbarre v. Legrand*, 103 Pa. St. 309.

³⁹⁶ *Robinson v. Howes*, 20 N. Y. 84.

³⁹⁷ *Homer v. Bank*, 140 Mo. 225, 41 S. W. 790; *Beckwith v. Bank*, 9 N. Y. 211. But see, contra, *Clute v. Warner*, 8 App. Div. 40, 40 N. Y. Supp. 392; *O'Connor v. Brandt*, 12 App. Div. 596, 42 N. Y. Supp. 1079; *Stolze v. Bank*, 67 Minn. 172, 69 N. W. 813; *Sweetser v. Bank* (Minn.) 71 N. W. 934.

³⁹⁸ *Niblack v. Bank*, 169 Ill. 517, 48 N. E. 438.

³⁹⁹ Whether it became due before the insolvency, *Finnell v. Nesbit*, 16 B.

⁴⁰⁰ *In re Bank of Minnesota* (Minn.) 73 N. W. 1096.

ings bank is not available, in New Hampshire, as a set-off against a debt due by the depositor to the bank.⁴⁰¹

If the note is transferred by the bank after it has become insolvent, it is still subject to the set-off of the maker's account.⁴⁰² But, in the hands of the bank, the note is only subject to the set-off of an account acquired by the defendant, by assignment or otherwise, before the insolvency of the bank.⁴⁰³

Set-Off Acquired after Suit.

§ 1855. To constitute a good set-off, it must appear that the note or other instrument was held by the defendant before the plaintiff's suit was begun.⁴⁰⁴ And it is not enough if he acquired it on the day the suit was begun, although before actual service of the writ.⁴⁰⁵ If, however, it was acquired before notice of the commencement of the action, and before the insolvency proceedings against the plaintiff, it has been held to be sufficient, in an action by his assignee in insolvency.⁴⁰⁶ On the other hand, a sealed note which was obtained before, but not transferred by assignment until after, suit brought, has been held inadmissible, although the assignment was dated back prior to the commencement of suit.⁴⁰⁷ And, even as

Mon. (Ky.) 351; *Penn Bank v. Farmers' Deposit Nat. Bank*, 130 Pa. St. 200. 20 Atl. 150; or afterwards, *Jones v. Robinson*, 26 Barb. (N. Y.) 310; *McCagg v. Woodman*, 28 Ill. 84; *Smith v. Spengler*, 83 Mo. 408; *Skiles v. Houston*, 110 Pa. St. 254, 2 Atl. 30. But the set-off may be excluded by special agreement with the bank. *Clark v. Bank*, 160 Mass. 26, 35 N. E. 108.

⁴⁰¹ *Cogswell v. Bank*, 59 N. H. 43.

⁴⁰² *Merchants' Exch. Bank v. Fuldner*, 92 Wis. 415, 66 N. W. 691.

⁴⁰³ *Higgins v. Worthington*, 90 Hun, 436, 35 N. Y. Supp. 815.

⁴⁰⁴ *Jefferson Co. Bank v. Chapman*, 19 Johns. (N. Y.) 322; *Hadley v. Wray*, 76 Ind. 476; *Northern Trust Co. v. Hiltgen*, 62 Minn. 361, 64 N. W. 909; *Speers v. Sterrett*, 29 Pa. St. 192. Although it was a note payable to A. or bearer. *Godley v. Barnes*, 13 Rich. (S. C.) 161. But see, contra, *Gaines v. Salmon*, 16 Tex. 311. As to set-offs arising before and after transfer of note, see § 1881. *infra*.

⁴⁰⁵ *Hardy v. Corliss*, 21 N. H. 356.

⁴⁰⁶ *Aldrich v. Campbell*, 4 Gray (Mass.) 284. And the burden is on the defendant to show that he held the set-off before the plaintiff's insolvency. *Smith v. Mosby*, 9 Helsk. (Tenn.) 501; *Lanier v. Institution*, 9 Helsk. (Tenn.) 506.

⁴⁰⁷ *Bishop v. Tucker*, 4 Rich. (S. C.) 178.

against the purchaser of a note after its dishonor, a set-off cannot be used which arose after the suit began.⁴⁰⁸ In equity, however, it has been held that the individual note of one partner, transferred to the firm after suit was begun, might be used as a set-off against the firm.⁴⁰⁹

Set-Off against Bankrupts.

§ 1856. Set-offs are now allowed by statute, both in England and the United States, against the estates of bankrupts.⁴¹⁰ So, the maker of a note may set off, against an insolvent holder, debts due to him from such holder.⁴¹¹ And where a note is transferred by the payee after he becomes bankrupt, a debt of the payee to one surety may be set off in an action brought by the indorsee against both sureties.⁴¹² So, the surety may set off a note protested before, and paid by him after, the principal debtor's assignment as an insolvent.⁴¹³ So, bills may be set off, although purchased after the drawer's insolvency.⁴¹⁴ But a note, purchased after maturity and after the maker's insolvency, cannot be set off against his assignee.⁴¹⁵ And, in a suit by the receiver of an insolvent bank against several makers, they cannot set up notes made by the bank and another party, which were held by one of the makers, and had not become due at the time the receiver was appointed.⁴¹⁶

⁴⁰⁸ Wood v. Brush, 72 Cal. 224, 13 Pac. 627.

⁴⁰⁹ Hall v. Kimball, 77 Ill. 162.

⁴¹⁰ Byles, Bills, 366; Green v. Farmer, 1 W. Bl. 651, 4 Burrows, 2214. And see 4 Anne, c. 17. So, under the former bankruptcy act in the United States, except as to claims acquired after petition filed (14 Stat. 526, § 20). So, Bankruptcy Act U. S. 1898, § 68.

⁴¹¹ Bernstein v. Coburn, 49 Neb. 734, 68 N. W. 1021.

⁴¹² Bank of Mobile v. Poelnitz, 61 Ala. 147.

⁴¹³ Morrow v. Bright, 20 Mo. 298. But see, contra, Nettles v. Huggins, 8 Rich. Law (S. C.) 273.

⁴¹⁴ McKinnon v. Armstrong, 2 App. Cas. 531; Colyer v. Craig, 11 B. Mon. (Ky.) 73. But see Oyster v. Short, 177 Pa. St. 589, 35 Atl. 686.

⁴¹⁵ Johnson v. Bloodgood, 1 Johns. Cas. (N. Y.) 51, 2 Calnes, 303; Anderson v. Van Alen, 12 Johns. (N. Y.) 343; Northern Trust Co. v. Hiltgen, 62 Minn. 361, 64 N. W. 909.

⁴¹⁶ Balch v. Willson, 25 Minn. 299.

Set-Off—Not Matured.

§ 1857. A bill or note cannot be set off until it is due;⁴¹⁷ nor unless it is due before the commencement of the action.⁴¹⁸ But where suit is brought in equity by the payee of a note, before it becomes due, upon an alleged fraudulent conspiracy between the maker and the indorsee, if the charge of fraud fails, and the note becomes due before answer is filed by the indorsee, it may be allowed as a set-off in the decree.⁴¹⁹ The burden is on the plaintiff to show that the payee's debt offered as a set-off was not due at the time the note was transferred to the plaintiff.⁴²⁰

Set-Off against Other Party.

§ 1858. A set-off between maker and indorser is no ground for arrest of judgment against them in favor of an indorsee.⁴²¹ On the other hand, a set-off established by the maker inures to his indorser, in a suit against them both.⁴²²

In an action by an indorsee against the acceptor, the latter cannot set off a debt from the indorsee to the drawer.⁴²³ But it is otherwise where the drawer is dead, and the bill was accepted for his

⁴¹⁷ *Citizens' Sav. Bank v. Vaughan* (Mich.) 73 N. W. 143.

⁴¹⁸ *Byles, Bills*, 368; *Chit. Bills*, 451; 2 *Pars. Notes & B.* 617; *Evans v. Prosser*, 3 Term R. 186; *Braithwaite v. Coleman*, 4 Nev. & M. 654; *Richards v. James*, 2 Exch. 471; *Gledstane's Case*, 1 Ch. App. 538; *Spaulding v. Backus*, 122 Mass. 553; *McAlpin v. Wingard*, 2 Rich. Law (S. C.) 547. Although the holder of the note, and acceptor of the bill offered in set-off to it, was insolvent. *Lockwood v. Beckwith*, 6 Mich. 168; *United States Trust Co. v. Harris*, 2 Bosw. (N. Y.) 75. And although the note became due before plea filed. *Deale v. Krofft*, 4 Cranch, C. C. 448, Fed. Cas. No. 3,698. As to maturity of set-off before insolvency, see § 1854, *supra*.

⁴¹⁹ *Griffin v. Chubb*, 16 Tex. 219.

⁴²⁰ *Jervey v. Strauss*, 11 Rich. Law (S. C.) 376.

⁴²¹ *Carriger v. Sicks*, 73 Ind. 76.

⁴²² *Wolf v. Michael*, 21 Misc. Rep. 86, 46 N. Y. Supp. 991; *Queen City Bank v. Brown*, 75 Hun, 259, 26 N. Y. Supp. 1016.

⁴²³ *Smith v. Adams*, 14 La. Ann. 409. It has even been held that a bank certifying a check cannot set up against the holder a debt due from him to it, on the ground that he brings suit practically as the drawer's agent. *Brown v. Leckie*, 43 Ill. 497.

accommodation.⁴²⁴ And, in general, the drawer and indorser are sureties for the acceptor, and can set off, as such, another acceptance of the plaintiff held by their acceptor (as the acceptor himself might do).⁴²⁵ So, the surety on a note may set up a counterclaim of his principal.⁴²⁶ And this is true of one joint and several maker, who is known to the payee to be only a surety for the other.⁴²⁷

The availability, as against a later indorsee or holder, of a set-off which existed against an earlier holder or indorser, will be considered in the next chapter.

Set-Off against Agent.

§ 1859. Where a note payable to A. or bearer is sued by the bearer, although he is the general agent of A., a set-off against A. will not be allowed.⁴²⁸ So, where a draft is indorsed for collection, and forwarded by a collecting bank (which afterwards failed), the balance against the bank cannot be set off by the collecting agent against the draft.⁴²⁹ But where a bill is indorsed in blank to a bank, and by it to another bank "for collection and credit," it may be held by the latter, and applied to balances against the first bank, allowed on the faith of an express agreement between the banks for such credits.⁴³⁰ But the balance due to the collecting bank from an in-

⁴²⁴ *Bowman v. Wright*, 7 Bush (Ky.) 375.

⁴²⁵ *Allen v. Kemble*, 6 Moore, P. C. 314.

⁴²⁶ *Slayback v. Jones*, 9 Ind. 470; *Lynch v. Bragg*, 13 Ala. 773; *Loring v. Morrison*, 15 App. Div. 498, 44 N. Y. Supp. 526; *Wyman v. Robbins*, 51 Ohio St. 98, 37 N. E. 264. But not where he is sued alone without the principal. *Phoenix Iron-Works Co. v. Rhea* (Tenn. Ch. App.) 38 S. W. 1079. And see *Stockton Savings & Loan Soc. v. Giddings*, 96 Cal. 84, 30 Pac. 1016, where he was allowed to set up breach of warranty of goods sold to the principal, but as a failure of consideration, and not as a set-off. *Mahurin v. Pearson*, 8 N. H. 539. And see § 923, *supra*.

⁴²⁷ *Bechervaise v. Lewis*, L. R. 7 C. P. 372. And see *Sefton v. Hargett*, 113 Ind. 592, 15 N. E. 513.

⁴²⁸ *Pettee v. Prout*, 3 Gray (Mass.) 502. But see, *contra*, as against a collecting agent of a note payable to bearer, *Royce v. Barnes*, 11 Metc. (Mass.) 276.

⁴²⁹ *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Central Railroad & Banking Co. v. First Nat. Bank*, 73 Ga. 383. And see § 726, *supra*.

⁴³⁰ *Bank of Metropolis v. Bank of New England*, 1 How. (U. S.) 236; *Vickrey v. Association*, 21 Fed. 773. And see *Wood v. Bank*, 120 Mass. 358.

intermediate collecting agent is not rendered admissible as a set-off by a mere usage between the banks to credit collections on account and settle such balances at regular intervals.⁴³¹ So, if bills are remitted by A., to be discounted and applied to a particular purpose, the party receiving the proceeds cannot set off a debt of A., who became bankrupt before they were received.⁴³² If a note, however, is made and delivered to a broker "for sale or advance," a purchaser advancing the amount by a credit given to the broker may set off the amount due to the broker.⁴³³

Set-Off against Trustee.

§ 1860. A note held by the defendant as trustee cannot be set off in an action brought against him individually.⁴³⁴ If an indorsee sues as trustee for the drawer, he will be subject to any set-off available against the drawer.⁴³⁵ So, it has been held that, where the claim sued upon belongs to a beneficial owner who is not a party, a set-off against him is a good defense.⁴³⁶ But, in an action on a note against A., he cannot set up a judgment recovered for his use in the name of B.,⁴³⁷ or a sealed bill made to B., as "agent of the creditors of A."⁴³⁸ Where A. sues on an account for the use of B., the defendant may set off a note of A., acquired by him before notice of the assignment to B., the burden being on the defendant to show when he obtained the note.⁴³⁹

⁴³¹ *Hackett v. Reynolds*, 114 Pa. St. 328, 6 Atl. 689.

⁴³² *Buchanan v. Findlay*, 9 Barn. & C. 738.

⁴³³ *Carman v. Garrison*, 13 Pa. St. 158.

⁴³⁴ *McDonald v. Harrison*, 12 Mo. 447. So, a fortiori, if he holds the note merely as collecting agent for the plaintiff, *Lewis v. Sheaman*, 28 Ind. 427; or if the note to be set off is then actually in the plaintiff's hands as pledgee, *Reilly v. Rucker*, 16 Ind. 303.

⁴³⁵ *Thornton v. Maynard*, L. R. 10 C. P. 695.

⁴³⁶ *Farwell v. Tyler*, 5 Iowa, 535. So, the debt of a lunatic ward may be set off against a note made to his guardian as such. *Nickerson v. Gilliam*, 20 Mo. 456.

⁴³⁷ *Harrel v. Petty*, 11 Rich. Law (S. C.) 373.

⁴³⁸ *Stryker v. Beekman*, 8 N. J. Law, 209.

⁴³⁹ *Smith v. Ewer*, 22 Pa. St. 116.

Set-Off against Administrator.

§ 1861. Where an action is brought by an executor in his own name, the defendant cannot set off a demand which existed against the testator at the time of his death.⁴⁴⁰ So, where one incurs a debt to an administrator for property purchased at the administrator's sale, he cannot set off a note made by the intestate;⁴⁴¹ although such set-off has been allowed in some states.⁴⁴² And if a legatee gives his note to an executor for money borrowed of the estate, it will be subject to a set-off of an amount due the maker from the estate, as against a purchaser after maturity.⁴⁴³ But although the administrator represents the maker's interest in the estate to be worth a given sum, and he purchases land and gives his note for an amount less than such sum, expecting to use the claim as a set-off, it will not be admissible as such.⁴⁴⁴ So, where suit is brought by an administrator for the balance of the intestate's bank account, a note by the intestate cannot be set off;⁴⁴⁵ especially if such note was purchased after the intestate died insolvent.⁴⁴⁶ And, in a suit by an administrator for a debt due the intestate in his lifetime, the defendant cannot set up a payment made by him, as surety for the intestate, after his death.⁴⁴⁷ So, a prior partnership account, which is already barred by statute, cannot be set up by the defendant against his note given to the executor of the deceased partner for a purchase of his interest.⁴⁴⁸

⁴⁴⁰ *Merritt v. Seaman*, 6 N. Y. 168.

⁴⁴¹ *Bales v. Hyman*, 57 Miss. 330. Although the estate was solvent. *Blizzell v. Stone*, 12 Ark. 378. So, even a judgment against the deceased cannot be set off, since it would affect the priority of other judgments. *McLean v. Leach*, 68 N. C. 95. But a subsequent agreement to credit the account of the maker against the heirs of the deceased is not a set-off, but a new agreement, and discharges the note. *Heckenkemper v. Dingwehrs*, 32 Ill. 538.

⁴⁴² *Mills v. Lumpkin*, 1 Kelly (Ga.) 511. Especially against an insolvent estate, and in the hands of an indorsee after maturity. *Ransom v. McClees*, 64 N. C. 17.

⁴⁴³ *Whedbee v. Reddick*, 79 N. C. 521.

⁴⁴⁴ *Floyd v. Rust*, 58 Tex. 503.

⁴⁴⁵ *Bosler's Adm'r's v. Bank*, 4 Pa. St. 32.

⁴⁴⁶ *Irons v. Sayles*, 5 R. I. 204.

⁴⁴⁷ *Minor v. Minor's Adm'r*, 8 Grat. (Va.) 1.

⁴⁴⁸ *Grew v. Burditt*, 9 Pick. (Mass.) 265.

Set-Off by a Joint Debtor.

§ 1862. Where suit is brought against a debtor, he cannot set off a debt due to himself and another jointly.⁴⁴⁹ But if one debtor is sued alone, on a joint note made by himself and another, he may plead the nonjoinder of the other, and set off a debt due to both.⁴⁵⁰ And where a suit is brought against one surviving partner, a debt due to both may be set off.⁴⁵¹ In a suit on a joint and several note, against one of the several makers, the debt due from the plaintiff to the other maker cannot be set off.⁴⁵² And where a note is made by one partner to another, for the purchase of his interest in the firm, and is signed by a creditor of the firm as surety, the surety cannot, after the payee's death, set off, against an indorsee, his own claim against the firm; but he will be liable to the indorsee as surety, and the maker and surviving partner as principal debtor.⁴⁵³

In like manner, if the action is brought against joint debtors, a debt due to one cannot be set off.⁴⁵⁴ So, in an action against two joint and several makers, a set-off in favor of one maker, who claims to be principal, is not admissible.⁴⁵⁵ And even in Illinois, where the statute makes joint obligations in general joint and several, a partnership note is a joint obligation, and not subject to a set-off in favor of one partner.⁴⁵⁶ So, in Massachusetts, as to an indorsement by a

⁴⁴⁹ *McKinley v. Winston*, 19 Ala. 301; *Miller v. Florer*, 19 Ohio St. 356; *Proctor v. Cole*, 104 Ind. 373, 3 N. E. 106, and 4 N. E. 303. So, too, in equity. *Reed v. Whitney*, 7 Gray (Mass.) 533.

⁴⁵⁰ *Stackwood v. Dunn*, 3 Q. B. 822.

⁴⁵¹ *Byles, Bills*, 369; *Slipper v. Stldstone*, 1 Esp. 47, 5 Term R. 493.

⁴⁵² *Jennings v. Shriver*, 5 Blackf. (Ind.) 37.

⁴⁵³ *Walker v. Eyth*, 25 Pa. St. 216.

⁴⁵⁴ *Robbins v. Brooks*, 42 Mich. 62, 3 N. W. 256; *Menaugh v. Chandler*, 89 Ind. 94; *First Nat. Bank of Newcastle v. Nugen*, 99 Ind. 160; *Bullard v. Dorsey*, 7 Smedes & M. (Miss.) 9; *Burgwin v. Babcock*, 11 Ill. 28; *Henderson v. Lewis*, 9 Serg. & R. (Pa.) 379; *Powell v. Hogue*, 8 B. Mon. (Ky.) 443; *Ritchie v. Moore*, 5 Munf. (Va.) 388. Unless an express agreement to that effect is shown, *Davis v. Notware*, 13 Nev. 421; or unless the maker claiming the set-off is the principal and the other maker only a surety, *Dodge v. Dunham*, 41 Ind. 191.

⁴⁵⁵ *Great Western Ins. Co. v. Pierce*, 1 Wyo. 45; *Lenoir v. Moore*, 61 Miss. 400.

⁴⁵⁶ *Coates v. Preston*, 105 Ill. 470.

stranger, made by the statute a co-maker.⁴⁵⁷ In some states, however, one of two joint defendants may set off a demand due to him alone from the plaintiff.⁴⁵⁸

Set-Off against a Joint Creditor.

§ 1863. Where a suit is brought by joint payees, the debt of one cannot be set off.⁴⁵⁹ So, against a partnership claim, the individual debt of one partner cannot be set off.⁴⁶⁰ So, in a foreclosure by the joint holders of a mortgage, the note of one cannot be used as a set-off.⁴⁶¹ But where suit is brought by two, on a note held for one of them, his individual debt to the maker at the commencement of the suit may be set off.⁴⁶² So, where A. sues as the surviving partner, his individual debt may be set off.⁴⁶³

In like manner, where A. sues in his sole right, his liability jointly with another on their joint note,⁴⁶⁴ or joint indorsement,⁴⁶⁵

⁴⁵⁷ *Brooks v. Stackpole*, 168 Mass. 537, 47 N. E. 419.

⁴⁵⁸ *Kent v. Rogers*, 24 Mo. 306; *Austin v. Feland*, 8 Mo. 309; *Robinson v. Furbush*, 34 Me. 509.

⁴⁵⁹ *Walker v. Hall*, 66 Miss. 390, 6 South. 318. And see *Wulschner v. Sells*, 87 Ind. 71, where a note to the wife for a consideration moving from the husband was held to be their joint property, and not subject to a set-off against the husband alone.

⁴⁶⁰ *Lovel v. Whitridge*, 1 McCord (S. C.) 16; *Ross v. Pearson*, 21 Ala. 473; *Johnson v. Kent*, 9 Ind. 252; *Scott v. Trent*, 1 Wash. (Va.) 77; *Henderson v. Gilliam*, 12 Tex. 71. But an exception is made in Massachusetts as to dormant partners (Pub. St. p. 982, § 9).

⁴⁶¹ Either in favor of the mortgagor or of his grantee, who had assumed the mortgage as part of the purchase-money, after deducting the amount of the note. *Williamson v. Fox*, 30 N. J. Eq. 488.

⁴⁶² *Forkner v. Dinwiddie*, 3 Ind. 34.

⁴⁶³ *Holbrook v. Lackey*, 13 Metc. (Mass.) 132.

⁴⁶⁴ *Burnatt v. Frazier* (Ky.) 40 S. W. 697. But see, contra, where the co-maker is deceased, and the note was a joint note, *McCarthy v. Sleight* (Mich.) 72 N. W. 165; or where the co-maker was the wife of the defendant, and his surety, *Abshire v. Corey*, 113 Ind. 484, 15 N. E. 685.

⁴⁶⁵ *Plets v. Johnson*, 3 Hill (N. Y.) 112; *Blankenship v. Rogers*, 10 Ind. 333; *Duramus v. Harrison*, 26 Ala. 326; *Robertson v. Parks*, 3 Md. Ch. 65; *Hilliard v. Walker*, 11 Ill. 644. But see, contra, *Hoffman v. Zollinger*, 39 Ind. 461; *Pate v. Gray*, Hempst. 155, Fed. Cas. No. 10,794a. So, where both joint debtors against whom the set-off is claimed are insolvent, and the plaintiff purchased the note in suit after maturity, *Baker v. Kinsey*, 41 Ohio St. 403.

cannot be used as a set-off. If a note made to A. is assigned to B., and the maker recovers judgment, before notice of the assignment, against A. and C., he may set off such judgment, in Mississippi, in a suit brought by B.⁴⁶⁶ And, although a claim against the plaintiff and another jointly is not matter of legal set-off against the plaintiff suing alone, it may be made so by agreement.⁴⁶⁷ And a joint and several note may be a set-off against a claim in favor of one of the makers.⁴⁶⁸

Set-Off between Partners—Husband and Wife—Against State.

§ 1864. Where a partner gives his note to another partner for the use of the firm, a partnership account against the payee is not within the jurisdiction of the court, and cannot be set off.⁴⁶⁹ So, if the note of a firm is indorsed to one partner, and transferred by him, even after maturity, to a purchaser for value, who had no notice of the relationship of the parties, an account between the firm and the indorsing partner cannot be set up.⁴⁷⁰ But where a partnership note to one partner is transferred after maturity, and after the dissolution of the firm, an account of the firm against the payee may be set off, although he had transferred to the other partner all his interest in claims belonging to the firm.⁴⁷¹

The debt of a married woman *dum sola* cannot be set off in an action brought by her husband alone, on a note given to her.⁴⁷² So, in an action by husband and wife on a note made to her before marriage, the defendant cannot set off a claim for property sold to husband and wife, which constitutes a liability of the husband only.⁴⁷³

⁴⁶⁶ *Peyton v. Compress Co.*, 63 Miss. 410.

⁴⁶⁷ *Perkins v. Hawkins*, 9 Grat. (Va.) 649; *Mitchell v. Sellman*, 5 Md. 376.

⁴⁶⁸ *Ferguson v. Millikin*, 42 Mich. 441, 4 N. W. 185; *Hurdle v. Hanner*, 50 N. C. 360. Although already sued jointly against A. & B. *Moore v. Andrews*, 13 U. C. C. P. 405.

⁴⁶⁹ *Anderson v. Robertson*, 32 Miss. 241. So, as against a partnership note to a partner (since deceased). *Willis v. Barron* (Mo. Sup.) 45 S. W. 289.

⁴⁷⁰ *Young v. Shriner*, 80 Pa. St. 463.

⁴⁷¹ *Davis v. Briggs*, 30 Me. 304.

⁴⁷² *Byles, Bills*, 369; *Chlt. Bills*, 31. Before marriage, *Burrough v. Moss*, 10 Barn. & C. 558; or after, *McCarty v. Mewhinney*, 8 Ind. 513.

⁴⁷³ *Smith v. Johnson*, 5 Har. (Del.) 40.

But a set-off against the husband alone is admissible, where the note to the wife has been merged in a judgment recovered in the husband's name.⁴⁷⁴ In an action, however, on a check, an account due from the payee to the drawer's wife is not admissible as a set-off.⁴⁷⁵

A set-off is not, in general, available against the state, as a suit would not lie against it.⁴⁷⁶

Set-Off Affected by Collateral—Judgment.

§ 1865. The fact that the defendant holds collateral is no bar to the admissibility of a set-off.⁴⁷⁷ And a note secured by collateral may be set off, without a surrender of the collateral.⁴⁷⁸ In California, however, the statute restricts the creditor's remedy in such case to foreclosure of the mortgage, and the note is not available as a set-off, without proof that the mortgage has no value.⁴⁷⁹

If the collateral has been converted by rehypothecation or otherwise, the damages resulting have been held to constitute a good set-off in an action upon the note;⁴⁸⁰ although a tender of the amount of the note has been held not to be available as a set-off, in an action of trover brought for the conversion.⁴⁸¹

The right to set-off is not waived by a verdict,⁴⁸² or even by a judgment and execution⁴⁸³ recovered against the plaintiff in a former action; nor by its having been offered as a set-off in another suit against another party, without further proof of facts constituting a bar.⁴⁸⁴

The admissibility of release and set-off as defenses against an indorsee or assignee is considered in the next chapter.

⁴⁷⁴ *Gilmore v. Bally*, 12 La. Ann. 562.

⁴⁷⁵ *Dolph v. Rice*, 21 Wis. 590.

⁴⁷⁶ *Chevallier's Adm'r v. State*, 10 Tex. 315.

⁴⁷⁷ *McKinnon v. Armstrong*, 2 App. Cas. 531.

⁴⁷⁸ *Wallace v. Finnegan*, 14 Mich. 170.

⁴⁷⁹ *McKean v. Bank*, 118 Cal. 334, 50 Pac. 656.

⁴⁸⁰ *Richardson v. Ashby*, 132 Mo. 238, 33 S. W. 806.

⁴⁸¹ *Empire Dairy Feed Co. v. Chatham Nat. Bank (Sup.)* 51 N. Y. Supp. 659.

⁴⁸² *Baskerville v. Brown*, 2 Burrows, 1229.

⁴⁸³ *Byles, Bills*, 368; *Peacock v. Jeffery*, 1 Taunt. 426.

⁴⁸⁴ *Smith v. Myler*, 22 Pa. St. 36.

CHAPTER XLVII.**EXCLUSION OF DEFENSES.****I. ESTOPPEL.****II. BONA FIDE HOLDER.****III. PAROL EVIDENCE.**

I. ESTOPPEL.**§ 1866. Estoppel by Contract or Relation of Parties.**

1867. — By Signature, Acceptance, etc.

1868. — By Representations or Recitals.

1869. — By Representations—Subsequent—By Others.

1870. — By Bill or Note.

1871. — By New Promise.

1872. — By Conduct.

1873. — By Negligence.

Estoppel by Contract or Relation of Parties.

§ 1866. The contract itself, by its very nature, or by the relation of the parties and their implied obligations to one another, often excludes a defense that would be otherwise admissible. Thus, an indorser cannot deny that the indorsement was made with his authority, where it has been used to take up an undisputed note of his own.¹ So, a partnership cannot show that a partner was not authorized to execute a guaranty after the dissolution of the firm, where the firm was previously bound to give such guaranty.² So, if a note is given in a corporate name by a corporation, which was not properly incorporated, it cannot deny the note after being regularly incorporated by another name.³ So, a bank which has drawn a bill in express violation of its charter cannot set this up against the payee, who received the bill from the bank in payment of its debt;⁴ or that notes issued by it were void, as exceeding the statutory limit of

¹ *Main v. Hilton*, 54 Cal. 110.

² *Star Wagon Co. v. Swezy*, 59 Iowa, 609, 13 N. W. 749.

³ *Empire Mfg. Co. v. Stuart*, 46 Mich. 482, 9 N. W. 527.

⁴ *Davis v. Bank*, 4 McLean, 387, Fed. Cas. No. 3,626.

debt.⁵ On the other hand, one who takes a note secured by collateral mortgage is not thereby estopped from contesting the validity of another note secured by the same mortgage.⁶

In general, the maker cannot set up want of legal capacity in the payee to make the loan;⁷ or to take the note, either directly⁸ or by purchase;⁹ or to transfer it.¹⁰ Nor can the maker set up the payee's failure to take security on the loan, as required by law;¹¹ or to make proper entries in its discount book.¹² So, it cannot set up that the corporation holding the note is liable to forfeit its charter on other grounds; e. g. on the ground of having suspended payment.¹³

⁵ Weber v. Bank, 12 C. C. A. 93, 64 Fed. 208, reversing 50 Fed. 735.

⁶ Coleman v. Witherspoon, 76 Ind. 285.

⁷ Poock v. Association, 71 Ind. 357; Little v. Obrien, 9 Mass. 423; Pleasant Val. Dist. Tp. v. Calvin, 59 Iowa, 189, 13 N. W. 80; Wyman v. Bank, 29 Fed. 734. And see §§ 244, 333, supra.

⁸ As a public officer, Miltenberger v. Cooke, 18 Wall. 421; or as a corporation legally constituted, Brickley v. Edwards, 131 Ind. 3, 30 N. E. 708; Bair v. Bank, 27 Neb. 577, 43 N. W. 347; Bank of Port Jefferson v. Darling, 91 Hun, 236, 36 N. Y. Supp. 153; Reynolds v. Roth, 61 Ark. 317, 33 S. W. 105. And see § 331, supra. Or legally authorized to take the note, Gorrell v. Insurance Co., 11 C. C. A. 240, 63 Fed. 371; or as a foreign corporation authorized to do business in the state, City Bank of Hartford v. Press Co., 56 Fed. 260, affirmed in 7 C. C. A. 248, 58 Fed. 321; Lauter v. Trust Co., 29 C. C. A. 473, 85 Fed. 894; or as a married woman, Castor v. Peterson, 2 Wash. St. 204, 26 Pac. 223. And see § 204, supra. So, he cannot set up, in defense to his note given for stock, that the bank took it in violation of its charter, requiring stock to be paid for in cash. Pine River Bank v. Hodsdon, 46 N. H. 114. Nor can he set up against an indorsee that the payee was a mere agent, and not authorized to take a note payable to himself. Wells v. Sutton, 85 Ind. 70. Nor, a fortiori, against a bona fide holder for value. Winship v. Bank, 42 Ark. 22.

⁹ Attleborough Nat. Bank v. Rogers, 125 Mass. 339; Ehrman v. Union Cent. Life Ins. Co., 35 Ohio St. 324; Merchants' Nat. Bank v. Hanson, 33 Minn. 40, 21 N. W. 849, overruling First Nat. Bank of Rochester v. Pierson, 24 Minn. 140.

¹⁰ Nelson v. Eaton, 26 N. Y. 410; Ehrman v. Union Cent. Life Ins. Co., 35 Ohio St. 324; Housum v. Rogers, 40 Pa. St. 190; Wolke v. Kuhne, 109 Ind. 313, 10 N. E. 116.

¹¹ Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248, affirming 1 Colo. 532.

¹² Moseby v. Bank (Pa. Sup.) 8 Atl. 166.

¹³ Farmers' Bank v. Garten, 34 Mo. 119. Or that it had indorsed the note

Estoppel by Signature—Acceptance—Indorsement.

§ 1867. The maker's signature does not estop him from setting up fraud as a defense.¹⁴ And he may show, at suit of the payee, that the note was given by their joint fraud to impose upon the bank examiner by way of apparent assets.¹⁵ But he cannot set up his own fraud to aid the payee in hindering his creditors.¹⁶ His understanding, however, that the intention was to use the note for another illegal purpose, will not estop him from setting up the defense of fraud.¹⁷ But one who signs a note as co-maker after its delivery to the payee for the purpose of procuring its discount by the plaintiff cannot set up that he executed the note without consideration.¹⁸

The acceptance of a bill admits the consideration between drawer and acceptor, and want of such consideration cannot afterwards be set up by the acceptor against the payee.¹⁹ So, the acceptor of a bill, drawn and indorsed by an agent in the same handwriting, cannot deny his authority as to either signature,²⁰ although he guaranties, in general, only the signature of the drawer.²¹ An indorsement, or even a transfer without indorsement, often creates an

(which it afterwards took up and now sues on) for an illegal consideration. *National Bank of Gloversville v. Burr*, 27 Hun (N. Y.) 109.

¹⁴ *Glazier v. Streamer*, 57 Ill. 91.

¹⁵ *Lime Rock Bank v. Hewett*, 50 Me. 267. But see, contra, *Winton v. Freeman*, 102 Pa. St. 366, as against an indorsee with notice of a fraud on creditors. So, as against a bank from which as payee a discount was procured for use in stock speculations of its cashier and teller, *Mead v. Bank*, 89 Hun. 102, 34 N. Y. Supp. 1054.

¹⁶ *Butler v. Moore*, 73 Me. 151; or to the prejudice of the sureties on payee's bond as a public officer, *Longline v. Fain*, 89 Tenn. 393, 18 S. W. 70.

¹⁷ *American Nat. Bank v. Cruger* (Tex. Sup.) 44 S. W. 278. So, the maker of a note may set up that the note was given for a conveyance of land in fraud of the grantor's creditors, although this was known to the grantee when he made the note. *Davis v. Sittig*, 65 Tex. 497.

¹⁸ *Rudolph v. Brewer*, 96 Ala. 189, 11 South. 314.

¹⁹ *Law v. Brinker*, 6 Colo. 555. Especially where the consideration is particularized in the bill, § 561, *supra*.

²⁰ *Jones v. Turnour*, 4 Car. & P. 204.

²¹ As to warranty of genuineness implied by acceptance, see § 629, *supra*, and by certifying a check, § 646, *supra*.

estoppel, in like manner, as to the genuineness of prior signatures, validity, etc.²²

Estoppel by Representations or Recitals.

§ 1868. Where the maker of a note represents to the purchaser that it is good, and thereby induces the purchase of the note, he is estopped from afterwards denying its validity.²³ And he may be estopped by a like representation as to the priority of collateral mortgages,²⁴ or to the effect that the note was business paper.²⁵ And where, at the time of transfer, the purchaser relies on the maker's promise to pay the note, he cannot afterwards set up that it was already paid.²⁶ A maker may, however, set up fraud notwithstanding his representation that it was good, if he had no knowledge of the fraud at that time.²⁷ Or he may set up the worthlessness of the consideration, which he did not ascertain until afterwards;²⁸ or the subsequent failure of the consideration.²⁹ It has even been held in a recent case that an accommodation indorser, as against his immediate indorsee (who knew of the accommodation), may set up usury, although he gave a written certificate that the

²² See § 748 et seq., supra.

²³ *Davison v. Franklin*, 1 Barn. & Adol. 142; *Tobey v. Chipman*, 13 Allen (Mass.) 123; *Rose v. Teeple*, 16 Ind. 37; *Rose v. Hurley*, 39 Ind. 77; *Vanderpool v. Brake*, 28 Ind. 130; *Henry v. McAllister*, 90 Ga. 557, 26 S. E. 469; *Plummer v. Bank*, 90 Ind. 380; *Shipley v. Reasoner*, 87 Iowa, 555, 54 N. W. 470; *Blades v. Newman* (Ky.) 43 S. W. 176; *Nye v. Chace*, 139 Mass. 379, 31 N. E. 736; *Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. 79; *Fleischmann v. Stern*, 90 N. Y. 110; *Brooks v. Martin*, 43 Ala. 360; *Wilkinson v. Searcy*, 74 Ala. 243. And such representation will be binding on the receiver appointed for the maker. *Armstrong v. Bank*, 133 U. S. 433, 10 Sup. Ct. 450. As to estoppels against a defense of coverture, see § 282, supra.

²⁴ *Dodge v. Pope*, 93 Ind. 480.

²⁵ *Fleischmann v. Stern*, 90 N. Y. 110. Although the purchaser took the note at a large discount. *Lynch v. Kennedy*, 34 N. Y. 151; *Reedy v. Brunner*, 60 Ga. 107. And see § 561, supra.

²⁶ *Davis' Adm'r v. Thomas*, 5 Leigh (Va.) 1.

²⁷ *Sackett v. Kellar*, 22 Ohio St. 554.

²⁸ *Allum v. Perry*, 68 Me. 232.

²⁹ *Cloud v. Whiting*, 38 Ala. 57, although such defense would be barred by a promise to the purchaser to pay the note.

note was business paper, "and not subject to defense for want of consideration, usury, or otherwise."³⁰

But, if the representation was itself obtained by fraud, it will create no estoppel.³¹ So, if it was based on a mistake;³² or where the purchaser had notice of the defect, and was not misled by the representation;³³ or where the representation was ambiguous, or in answer to an ambiguous question.³⁴ The liability for negligence in guarding against alteration and forgery has been already discussed.

The maker may be estopped by a recital in the note,³⁵ or in a collateral mortgage,³⁶ or contemporaneous agreement construed with the note.³⁷ So, too, an indorser by recital in his indorsement.³⁸

If a note recites that all the makers are principals, it has been held that one maker cannot set up, even against the payee, that he was surety for the other.³⁹

³⁰ *Lewis v. Barton*, 106 N. Y. 70, 12 N. E. 437.

³¹ *Hill v. Thixton*, 94 Ky. 96, 23 S. W. 947; *Jaqua v. Montgomery*, 33 Ind. 368.

³² *Lyndonville Nat. Bank v. Fletcher*, 68 Vt. 81, 34 Atl. 38 (saying a note was paid which had been stamped "Paid" on receipt of a forged renewal).

³³ *Spray v. Burk*, 123 Ind. 565, 24 N. E. 588. So, as to admission of a forged renewal as genuine. *Second Nat. Bank of Reading v. Wentzel*, 151 Pa. St. 142, 24 Atl. 1087.

³⁴ E. g. to a telephone question whether a check was "all right," the indorsement being forged, *German Sav. Bank of Davenport v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769; or to a question at the bank certifying a check, whether it was good, the body of the check having been altered, *Clews v. Association*, 89 N. Y. 418. And see § 1780 et seq., supra.

³⁵ *Nott v. Thomson*, 35 S. C. 461, 14 S. E. 940; *White v. Goldsberg*, 49 S. C. 530, 27 S. E. 517 (recitals of benefit to wife's separate estate). And see § 282, supra. And, as to recitals in municipal bonds, see § 345, supra. But a waiver of defense in the note will not exclude a counterclaim for damages for breach of warranty in the thing purchased. *Osborne v. McQueen*, 67 Wis. 392, 29 N. W. 636.

³⁶ *Brandenburgh v. Bank* (Ky.) 45 S. W. 108 (excluding condition for other signatures). But see, as to wife's suretyship for husband, *Cole v. Temple*, 142 Ind. 498, 41 N. E. 942.

³⁷ *Chapman v. Skellie*, 65 Ga. 124 (agreement not to plead failure of consideration); or in the deed for which the note was given, *Reed v. Litsey* (Ky.) 33 S. W. 827.

³⁸ *Kempner v. Huddleston*, 90 Tex. 182, 37 S. W. 1066 (recital of value paid).

³⁹ *Menaugh v. Chandler*, 89 Ind. 94.

Subsequent Representations—By Other Party.

§ 1869. If the maker or indorser says, after the transfer of a note, that it is all right, such representation will not constitute an estoppel.⁴⁰ But if the holder informs the indorser, after the note matures, that it has been paid, it will discharge the indorser.⁴¹ And a surety will be discharged by such information if he is induced by it to surrender to the principal securities held by him.⁴² So, if the holder informs the maker that the note was paid or to be paid by the party for whom it was really made, and that the maker need have no further trouble, and the maker (in effect a surety) thereupon gives up to such other party the goods for the purchase of which the note was given.⁴³ So, the indorser of a note will be estopped from denying his signature as against a plaintiff who has relied on his previous admissions, and delayed suit until the maker became insolvent.⁴⁴ And in some states the defendant's failure to deny his signature by plea is an admission, and dispenses, *prima facie*, with further proof of it.⁴⁵

⁴⁰ *Crossan v. May*, 68 Ind. 242; *Windle v. Canaday*, 21 Ind. 248; *Stutsman v. Thomas*, 39 Ind. 384. So, where the maker or drawer named in a forged note or bill says that it "will be paid." *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 45 N. E. 923.

⁴¹ Such holder being also the executor of the maker. *State Bank v. Wilson*, 12 N. C. 484. So, where the holder informed the indorser, after judgment against him and the maker, that he should not be held, and induced him to neglect to secure himself when he could have done so. *Roberts v. Miles*, 12 Mich. 297. But such representation to an indorser before maturity will not discharge him where he has not been prejudiced. *De Nayer v. Bank*, 8 Neb. 105.

⁴² *Grant v. Cropsey*, 8 Neb. 205. But the holder may discontinue an attachment against the principal, although he had informed the surety of it, and the surety had thereupon neglected to secure himself. *Barney v. Clark*, 46 N. H. 514.

⁴³ *Manufacturers' Bank of Troy v. Scofield*, 39 Vt. 590.

⁴⁴ *Bates v. Leclair*, 49 Vt. 229.

⁴⁵ The denial must be by plea in FLORIDA (Rev. St. § 1073); MASSACHUSETTS (Pub. St. c. 167, § 21); by plea or affidavit in INDIANA (Horner's Rev. St. § 364); by answer verified by oath in KENTUCKY (Ky. St. § 473); by affidavit and plea in MISSOURI (Rev. St. § 2186); NEVADA (Gen. St. § 3557); TEXAS (Rev. St. arts. 313, 2318); VIRGINIA (Code, § 3279); WEST VIR-

If one places a note in the hands of a broker for sale, and it is represented by him to be good business paper, it will estop the maker from denying that fact.⁴⁶ But the admission of one maker as to the validity of a nonnegotiable note will not prevent the other from setting up a want of consideration.⁴⁷ And a representation by the drawer of a bill, for whose accommodation it was accepted, to the purchaser, at the time of purchase, will not create an estoppel against the acceptor.⁴⁸ So, in general, the admission of a party, although made while he is the owner and in possession, will not bind other parties;⁴⁹ especially where such parties were in no way identified in interest, and the admission was not part of

GINIA (Code, c. 125, § 40); WISCONSIN (Sandb. & B. Ann. St. § 4192). So, in NEW HAMPSHIRE, under the present rules, *Great Falls Bank v. Farmington*, 41 N. H. 32. And see *Vance v. Funk*, 3 Ill. 263. And in ARKANSAS, if the plaintiff makes oath that he believes there is no defense (Sand. & H. Dig. § 5763). If not denied, the instrument must still be produced. *Sebree v. Dorr*, 9 Wheat. 558. But, in VIRGINIA no evidence can be afterwards given to disprove its execution. *Phaup v. Stratton*, 9 Grat. 615. And, if denied, the execution must be proved. *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236.

⁴⁶ *Ahern v. Goodspeed*, 9 Hun (N. Y.) 263. See, as to representations by the agent of a corporation, § 370, *supra*; and, as to estoppel by acts of an agent, § 392, *supra*. *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 528, 7 Atl. 318.

⁴⁷ Although the plaintiff relied on the admission in purchasing the note. *Lewis v. Woodworth*, 2 N. Y. 512. In general, however, if the partnership is established, such admission will bind the other partners. *Chit. Bills*, 703; *Gray v. Palmers*, 1 Esp. 135; *Wood v. Braddick*, 1 Taunt. 104. But not without first proving the partnership. *Tuttle v. Cooper*, 5 Pick. (Mass.) 414. And the partnership cannot be proved by the declaration of one partner made in the absence of the other. *King v. Barbour*, 70 Ind. 35.

⁴⁸ *Jackson v. Fassitt*, 33 Barb. (N. Y.) 645.

⁴⁹ *Byles*, *Bills*, 439; *Hemings v. Robinson*, *Barnes*, 436; *Pocock v. Billing*, 2 Bing. 269; *Dodge v. Freedman's Savings & Trust Co.*, 93 U. S. 379; *Whitaker v. Brown*, 8 Wend. (N. Y.) 490; *Paige v. Cagwin*, 7 Hill (N. Y.) 361; *Camp v. Walker*, 5 Watts (Pa.) 482; *De Bruhl v. Patterson*, 12 Rich. Law (S. C.) 363. But see, *contra*, as to the admission of an assignor as affecting subsequent assignees. *Thorp v. Goewey*, 85 Ill. 611; *Snelgrove v. Martin*, 2 McCord (S. C.) 242; *Sharp v. Smith*, 7 Rich. Law (S. C.) 3; *Stoner v. Ellis*, 6 Ind. 152; *Blount v. Riley*, 3 Ind. 471. So, as to the assignee of a nonnegotiable note, *Shade v. Creviston*, 93 Ind. 591; *Abbott v. Muir*, 5 Ind. 444.

the *res gestæ*.⁵⁰ So, the indorser's admissions, after he has parted with his interest, will not bind the maker.⁵¹ But a pledgor may bind himself by admissions as to any interest remaining in him after the pledge is satisfied.⁵² So, a principal will be bound by the admissions of a fully-authorized agent,⁵³ or a trustee by the admissions of his *cestui que trust*.⁵⁴ So, a purchaser after maturity is subject to admissions made by a prior holder, while owning the instrument.⁵⁵

Estoppel by Bill or Note.

§ 1870. Where a bill or note is given in settlement of an account, it will in general bar further inquiry into the account.⁵⁶ So, if the maker, after learning that the consideration between him and the payee has failed, gives a new note to the indorsee of the original note, it will be a waiver of the defense.⁵⁷ So, if he gives a new note to the bona fide holder of a note originally obtained from him by fraud.⁵⁸ So, if A. gives his note to B. to reimburse him for giving (and afterwards paying) his own note for A.'s debt, which was supposed by him to be valid, but was in reality for gambling losses.⁵⁹

⁵⁰ Chit. Bills, 743; *Beauchamp v. Parry*, 1 Barn. & Adol. 89; *Phillips v. Cole*, 2 Per. & D. 288. But it is otherwise where the parties are identified in interest, *Byles, Bills*, 434; *Pocock v. Billing*, 2 Bing. 269, *Ryan & M.* 127; or the admissions formed part of the original *res gestæ*, *Kent v. Lowen*, 1 Camp. 177.

⁵¹ *Andrews v. Campbell*, 36 Ohio St. 361.

⁵² *Bond v. Fitzpatrick*, 8 Gray (Mass.) 536.

⁵³ *Reed v. Vancleve*, 27 N. J. Law, 352; *Bank of Newbury v. Sinclair*, 60 N. H. 100.

⁵⁴ Chit. Bills, 743; *Welstead v. Levy*, 1 Moody & R. 138.

⁵⁵ *Curtiss v. Martin*, 20 Ill. 557; *Eaton v. Corson*, 59 Me. 510. But see, contra, *Shober v. Jack*, 3 Mont. 351.

⁵⁶ Chit. Bills, 201; *Knox v. Whalley*, 1 Esp. 159; *Trueman v. Hurst*, 1 Term R. 40; *Chandler v. Dorsett*, Finch, 431; or the manner in which the account was charged, *Audleur v. Kuffel*, 71 Ind. 543; or the time when the consideration (goods purchased) was delivered, *Reid v. Field*, 83 Va. 26, 1 S. E. 395. So, where a former indorsed note is surrendered, *Coco v. Lacour*, 4 La. 507. As to the effect of a new bill upon the original defense, see § 1583 et seq., supra.

⁵⁷ *Griffith v. Trabue*, 11 Heisk. (Tenn.) 645.

⁵⁸ *Ross v. Webster*, 63 Conn. 64, 26 Atl. 476.

⁵⁹ *Bangs v. Hornick*, 30 Fed. 97.

So, he cannot set up usury in the original debt, after giving his negotiable note in satisfaction of a judgment rendered on it, and for an extension of time.⁶⁰ And, where the maker sets up that the note was given for land under a false representation as to its location, the defense will be barred, if it appears that the note was given after learning the correct location.⁶¹ So, if he gives a note after the accruing of a cause of action, which was known to him, he cannot avail himself of it as a set-off.⁶² But an existing set-off will not be barred by the renewal of the original note by the maker's executor.⁶³

The holder of a note, on the other hand, after receiving it in renewal of a prior note, cannot set up that it was given for another purpose.⁶⁴

Estoppel by New Promise.

§ 1871. Where a party has been discharged by an extension or otherwise, such defense may be waived by a new promise afterwards made with knowledge of the discharge.⁶⁵ This is true, also, of a discharge in bankruptcy.⁶⁶ But a promise, made without knowledge of the fact of discharge, will not create an estoppel.⁶⁷ And a new promise, to amount to such, must be unambiguous and explicit.⁶⁸ An account stated has been held sufficient to estop a party

⁶⁰ *Gipson v. Shanklin*, 83 Ind. 147. So, where he gives his note to a trustee, who pays the maker's debt. *Jenkins v. Levis*, 25 Kan. 479.

⁶¹ *Isham v. Davidson*, 1 Hun (N. Y.) 114.

⁶² *Borchsenius v. Canutson*, 7 Ill. App. 365.

⁶³ *Caldwell v. Powell*, 6 Baxt. (Tenn.) 82.

⁶⁴ *Dewey v. Bell*, 5 Allen (Mass.) 165.

⁶⁵ So held as to a promise of the drawer after extension to the acceptor, *Stevens v. Lynch*, 12 East, 38; or of the accommodation acceptor after extension to the drawer, *Kerrison v. Cooke*, 3 Camp. 362; or of a surety, receiving indemnity, after extension to the principal, *Fowler v. Brooks*, 13 N. H. 240; or after being released by the release of a co-surety, *Mayhew v. Crickett*, 2 Swanst. 190. So, even a promise for new consideration to assume a forged indorsement as a valid debt. *Toof v. Rosenplanter* (Tenn. Sup.) 41 S. W. 336.

⁶⁶ *Henly v. Lanier*, 75 N. C. 172; *Fraley v. Kelly*, 79 N. C. 348; *Apperson v. Stewart*, 27 Ark. 619; *Jones v. Sennott*, 57 Vt. 355.

⁶⁷ *Mackay v. Holland*, 4 Metc. (Mass.) 69; *Long v. Dismar*, 71 Mo. 452. So, by statute in GEORGIA (Civ. Code, § 2076). So, a promise to pay a renewal, not knowing it to be forged. *Barry v. Kirkland* (Ariz.) 52 Pac. 771.

⁶⁸ *Huffman v. Johns* (Pa. Sup.) 6 Atl. 205, 10 East. Rep. 729. And not a (2614)

from setting up usury in a note included in it.⁶⁹ So, the allowance of a bill by an executor, without offset marked on it, is a waiver of existing set-offs as against a bona fide holder.⁷⁰ The promise to pay must be unconditional;⁷¹ or if there is a condition, its performance must be shown.⁷² And the promise must be made to the creditor or his agent.⁷³ Thus, a new promise by the maker to the payee, even before transfer, will not estop him from setting up his discharge as an insolvent, as against a subsequent purchaser.⁷⁴ It has been held, too, that the subsequent promise must be based on a good consideration.⁷⁵ But the rule seems to be that no new consideration is necessary to a mere waiver of discharge in bankruptcy.⁷⁶

Estoppel by Conduct.

§ 1872. A party may be estopped from setting up fraud by agreeing to an extension, with knowledge of the facts constituting the fraud, although he was ignorant of their legal effect.⁷⁷ If the payee has an election to take collateral stock certificates in payment at the maturity of the note secured, and return the note, his transfer of the note before maturity will amount to an election to hold the certificates as collateral only.⁷⁸ If the holder enters judgment for principal and interest, he cannot make any further claim for a higher rate of interest, although it was stipulated in the note.⁷⁹

mere acknowledgment of the justice of the debt. *Horner v. Speed*, 2 Pat. & H. (Va.) 616. But see, as to a formal admission merging into a judgment on supplementary proceedings, *Rice v. Jones*, 103 N. C. 226, 9 S. E. 571.

⁶⁹ *Bullard v. Raynor*, 30 N. Y. 197.

⁷⁰ *Selkirk v. McCormick*, 33 Tex. 136.

⁷¹ *Branch Bank at Mobile v. Boykin*, 9 Ala. 320.

⁷² *Wakeman v. Sherman*, 9 N. Y. 85.

⁷³ *Wakeman v. Sherman*, *supra*.

⁷⁴ *Depuy v. Swart*, 3 Wend. (N. Y.) 135.

⁷⁵ *Henry v. Gilliland*, 103 Ind. 177; *Ray v. McMurtry*, 20 Ind. 307. An extension is sufficient, *Brown v. Bank*, 115 Ind. 572, 18 N. E. 56; or the cancellation of a previous note which was about to become outlawed, *Parsons v. Frost*, 55 Mich. 230, 21 N. W. 303.

⁷⁶ *Way v. Sperry*, 6 Cush. (Mass.) 238, or even without written memorandum, *Hobaugh v. Murphy*, 114 Pa. St. 358, 7 Atl. 139, and 11 East. Rep. 12.

⁷⁷ *Rindskopf v. Doman*, 28 Ohio St. 516.

⁷⁸ *Oatman v. Taylor*, 29 N. Y. 649.

⁷⁹ *McKay v. Fee*, 20 U. C. Q. B. 268.

Where a note has been obtained from the maker by fraud, he may be estopped by afterwards going about with the payee to obtain additional signatures.⁸⁰ So, on a note known to be forged, by making part payments in order to screen the forger.⁸¹ So, where the defendant's own action has prevented the performance of the plaintiff's contract, which was the condition of his acceptance,⁸² or the consideration for his note.⁸³ So, where he has transferred the paper in settlement of an open account, and treated it as valid until after the account was barred.⁸⁴

But, even where the making of a note is induced by fraud, the maker cannot avail himself of it without making or offering restitution of the consideration received for it.⁸⁵ And retaining the consideration received is, in general, a complete estoppel against defenses which were otherwise available.⁸⁶

If a mortgage is given to secure two notes for the purchase money of land conveyed by a warranty deed, and the maker pays off a prior incumbrance after the grantor's insolvency, he will be estopped from using such payment as a set-off against the first note in the hands of an indorsee, where he has already paid off the last note in the hands of another indorsee.⁸⁷ So, it has been held that the maker of a note is estopped from availing himself of a set-off, of which he gave no notice to the purchaser, although he knew that

⁸⁰ *Yellow Medicine Co. Bank v. Wiger*, 59 Minn. 384, 61 N. W. 452.

⁸¹ *Buck v. Wood*, 85 Me. 204, 27 Atl. 103.

⁸² *Home Bank v. Drumgoole*, 109 N. Y. 63, 15 N. E. 747.

⁸³ *Kolp v. Specht*, 11 Tex. Civ. App. 685, 33 S. W. 714.

⁸⁴ *Carter v. Bolin*, 11 Tex. Civ. App. 283, 32 S. W. 123.

⁸⁵ *Heaton v. Knowlton*, 53 Ind. 357. So, he cannot resist payment of a note given for land because of the insufficiency of the deed, and not offer to reconvey and surrender possession, *Kenworthy v. Merritt*, 2 Wash. T. 155, 7 Pac. 62; or set up usury in a contract made by him as agent after having received credit from his principal for the entire amount, *Drake v. Lowry*, 14 Iowa, 125.

⁸⁶ *People's Bank v. National Bank*, 101 U. S. 181; *Hackettstown Nat. Bank v. Ming*, 52 N. J. Eq. 157, 27 Atl. 920; *German Nat. Bank v. Louisville Butchers' Hide & Tallow Co.*, 97 Ky. 34, 29 S. W. 882; *Hawkins v. Bank (Ind. Sup.)* 49 N. E. 957; *Union Loan & Trust Co. v. Southern California Motor Road Co.*, 51 Fed. 840.

⁸⁷ *Doss v. Ditmars*, 70 Ind. 451.

the note was to be transferred.⁸⁸ So, the stockholders of a corporation may be estopped from setting up that its bonds were ultra vires by their laches in suffering them to be issued.⁸⁹ So, a surety may waive his discharge by acquiescing by his conduct in an extension allowed by bank usage to the principal debtor.⁹⁰

On the other hand, a maker will not be estopped from setting up payment by authorizing the holder to retain the note after maturity as against the principal maker.⁹¹ So, a partner may set up in defense that the firm indorsement was made as an accommodation by another partner without his consent, although he knew of such partner's practice and had frequently protested against it.⁹² So, the maker may set up a breach of warranty in the deed, for which the note was given, notwithstanding a cross action brought by him for damages on the contract.⁹³ So, his action will not be barred by the fact that he has brought suit on the note against another person as maker, unless the defendant has been prejudiced by it.⁹⁴ And a defense will not be barred by the omission to plead it to other notes, given for the same consideration, and sued by other parties.⁹⁵

Estoppel by Negligence.

§ 1873. Where a party signs a note under the belief that it is a different paper, although he is misled by the fraud of the payee or of some other party, he will be estopped from setting up the fraud against a bona fide purchaser before maturity, if he has been guilty of negligence in executing the paper.⁹⁶ And he will not be

⁸⁸ *King v. Fowler*, 16 Mass. 397; or on receiving notice of the transfer, *Albee v. Little*, 5 N. H. 277.

⁸⁹ *Tyrell v. Railroad Co.*, 7 Mo. App. 294.

⁹⁰ *Stratford Bank v. Crosby*, 8 Me. 154.

⁹¹ *Hardy v. Waddell*, 58 N. H. 460. At the suit of an indorsee after maturity.

⁹² *Smith v. Weston*, 88 Hun, 25, 34 N. Y. Supp. 557. And see § 417, *supra*.

⁹³ *Applegarth v. Robertson*, 65 Md. 493, 4 Atl. 896.

⁹⁴ *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11.

⁹⁵ *Davis v. Brown*, 94 U. S. 423.

⁹⁶ *Chapman v. Rose*, 56 N. Y. 137; *Kellogg v. Curtis*, 65 Me. 59; *Carey v. Miller*, 25 Hun (N. Y.) 28; *Fenton v. Robinson*, 4 Hun (N. Y.) 252; *Citizens' Nat. Bank v. Smith*, 55 N. H. 593; *Fulford v. Block*, 8 Ill. App. 284; *Ross v. Doland*, 29 Ohio St. 473; *McDonald v. Bank*, 27 Iowa, 319; *Douglass v.*

excused by mere inability to read without glasses, which were not at hand;⁹⁷ or by his ignorance of the language;⁹⁸ or even by his inability to read, where there were other persons present, who could have read the paper to him,⁹⁹ and where he has made no effort whatever to ascertain what the instrument was.¹⁰⁰ And where the maker of an instrument sets up such fraud as a defense, if he intended to make a note (although different in its terms), the burden is on him to show that he was not negligent.¹⁰¹ Negligence in such case is a question of fact for the jury to determine.¹⁰²

Matting, 29 Iowa, 498; Wright v. Flinn, 33 Iowa, 159; Nebeker v. Cutsinger, 48 Ind. 436; Glenn v. Porter, 49 Ind. 500; Woollen v. Ulrich, 64 Ind. 120; Thomas v. Ruddell, 66 Ind. 326; Fisher v. Von Behren, 70 Ind. 19; Ruddell v. Fhalor, 72 Ind. 533; Williams v. Stoll, 79 Ind. 80; First Nat. Bank of Parkersburgh v. Johns, 22 W. Va. 520; Shirts v. Overjohn, 60 Mo. 305; Frederick v. Clemens, Id. 313; Ort v. Fowler, 31 Kan. 478, 2 Pac. 580; Goetter v. Pickett, 61 Ala. 387; Orr v. Sparkman (Ala.) 23 South. 829; Maxwell v. Morehart, 66 Ind. 301; Baldwin v. Bricker, 86 Ind. 221; Wickham v. Grant, 28 Kan. 517; Ward v. Johnson, 51 Minn. 480, 53 N. W. 766; Perkins v. White, 36 Ohio St. 530; Mackey v. Peterson, 29 Minn. 298, 13 N. W. 132; Kitchen v. Loudenback, 48 Ohio St. 177, 26 N. E. 979. So, as to fraud in general, Mosher v. Carpenter, 13 Hun (N. Y.) 602.

⁹⁷ Bedell v. Herring, 77 Cal. 572, 20 Pac. 129; McCoy v. Gouvion (Ky.) 43 S. W. 699; Maxwell v. Morehart, 66 Ind. 301. But see, contra, after verdict, where the maker's children were present and could read. Griffiths v. Kellogg, 39 Wis. 290. See, too, Soper v. Peck, 51 Mich. 563, 17 N. W. 57.

⁹⁸ In this case it did not appear that the note was read to him or misrepresented. Fisher v. Von Behren, 70 Ind. 19; Boagni v. Fouchy, 26 La. Ann. 594; Wickham v. Grant, 28 Kan. 517.

⁹⁹ Baldwin v. Barrows, 86 Ind. 351. And see Perkins v. White, 36 Ohio St. 530.

¹⁰⁰ Ruddell v. Dillman, 73 Ind. 518.

¹⁰¹ Fenton v. Robinson, 4 Hun (N. Y.) 252; Fayette Co. Sav. Bank v. Steffes, 54 Iowa, 214, 6 N. W. 287.

¹⁰² Baldwin v. Bricker, 86 Ind. 221; Webb v. Corbin, 78 Ind. 403; Homes v. Hale, 71 Ill. 552; Sim v. Pyle, 84 Ill. 271; Hopkins v. Insurance Co., 57 Iowa, 203, 10 N. W. 605; Leach v. Nichols, 55 Ill. 273; Yellow Medicine Co. Bank v. Wiger, 59 Minn. 384, 61 N. W. 452; Soper v. Peck, 51 Mich. 563, 17 N. W. 57; Dodd v. Dunne, 71 Wis. 582, 37 N. W. 430. But, if the facts are admitted, it is a question of law. Kellogg v. Curtis, 65 Me. 59. But it cannot be raised by demurrer. Munson v. Nichols, 62 Ill. 111. As to the duty of consulting other members of the family, if the maker is unable to read, see National Exch. Bank v. Ogden, 31 Hun (N. Y.) 452; Same v. Veneman, 43 Hun (N. Y.) 241.

§ 1874. — But, where there has been no negligence on the maker's part, there is no estoppel in such case.¹⁰³ And it is not of itself negligence that a maker, not knowing how to read, was induced to sign the paper by fraudulent representations leading him to believe it was a different contract;¹⁰⁴ or to sign a paper which was afterwards converted into a note.¹⁰⁵ Neither is it negligence, necessarily, to trust the agent of the payee to read a note correctly.¹⁰⁶ If the owner of a bill intrusts it with his blank indorsement to an agent, who makes a fraudulent disposition of it, he will be estopped from setting up the fraud against a bona fide holder.¹⁰⁷ And where an acceptance is indorsed in blank by A., and delivered to his agent to pay to B., on a certain note made by A., and the agent by a fraudulent representation induces B.'s cashier to fill in the blank indorsement specially to him, and misappropriates the proceeds, B. will not be liable to A. for such fraud.¹⁰⁸

The effect of negligence as an estoppel against other defenses, such as alteration, forgery, and want of delivery, has been considered already in treating of those special topics.

¹⁰³ *Kellogg v. Steiner*, 29 Wis. 626; *Walker v. Ebert*, Id. 194; *Martin v. Smylee*, 55 Mo. 577. E. g. where after reading another contract was substituted by sleight of hand. *Gibbs v. Linabury*, 22 Mich. 479. And see § 181, supra. And mere illiteracy is not neglect, and does not require more than ordinary prudence. *Sims v. Bice*, 67 Ill. 88; *Taylor v. Atchison*, 54 Ill. 196. And a mistake in accepting a payment, due to such illiteracy, creates no estoppel as against the party who took advantage of it. *Devine v. Bank*, 91 Wis. 68, 64 N. W. 589.

¹⁰⁴ *Baldwin v. Bricker*, 86 Ind. 221; *Bowers v. Thomas*, 62 Wis. 480, 22 N. W. 710; *Richardson v. Schirtz*, 59 Ill. 313. So, where the paper was fraudulently misread to him. *Webb v. Corbin*, 78 Ind. 403. There being no one within a quarter of a mile who could read. *Yeagley v. Webb*, 86 Ind. 424.

¹⁰⁵ *Puffer v. Smith*, 57 Ill. 527. And see, as to the fraudulent alteration of a collateral agreement after transfer to a bona fide purchaser, *Strough v. Gear*, 48 Ind. 100.

¹⁰⁶ *Hopkins v. Insurance Co.*, 57 Iowa, 203, 10 N. W. 605.

¹⁰⁷ *Putnam v. Sullivan*, 4 Mass. 45; *Charles River Nat. Bank v. Davis*, 100 Mass. 413; or as a ground for recovering the note from a bona fide holder, *Connell v. Bliss*, 52 Me. 476. And, as to the effect of neglect in signing blank instruments or leaving blanks, see §§ 181, 187, 1770, supra.

¹⁰⁸ *Weirick v. Bank*, 16 Ohio St. 297. But leaving a rubber stamp for signature locked up in his safe, from which it was taken by an office boy, is not negligence. *Robb v. Insurance Co. (Pa.)* 40 Atl. 969.

II. DEFENSE AGAINST BONA FIDE HOLDER.

- § 1875. Defense against Payee.
- 1876. Holder with Notice.
- 1877. — Without Indorsement.
- 1878. — Without Consideration—Pledgee.
- 1879. Purchaser after Maturity.
- 1881. — Set-Off.
- 1882. — Set-Off—Statutes.
- 1883. — After Transfer and Notice.
- 1884. Collateral—Nonnegotiable Paper.
- 1885. Bona Fide Holder.
- 1886. — Capacity—Authority.
- 1887. — Consideration.
- 1888. — Condition.
- 1889. — Illegality.
- 1890. — Usury.
- 1891. — Fraud.
- 1892. — Fraud—Between Whom.
- 1893. — Fraud in Delivery.
- 1894. — Fraud—Diversion of Accommodation Paper.
- 1895. — Release—Satisfaction and Set-Off.

Defense against Payee.

§ 1875. Defenses are available, in general, against the payee or other immediate party to commercial paper as in other contracts. And equities are admissible, in like manner, against the payee's collecting agent;¹⁰⁹ or against one who sues as indorsee "to the use of the payee."¹¹⁰ So, where the payee is partner and agent of the plaintiff in the transaction for which the note was given.¹¹¹ And, even where the payee repurchases the note from a bona fide holder he is subject to such defenses as were originally available against him.¹¹² So, where a merely nominal payee indorses to the real party in a usurious contract, the maker will not be liable to the latter, nor

¹⁰⁹ *Sinnot v. Schlater*, 22 La. Ann. 201.

¹¹⁰ E. g. on an agreement to repay the drawer, if collected. *Wilson v. Holmes*, 5 Mass. 543.

¹¹¹ *Kelly v. Pember*, 35 Vt. 183.

¹¹² *Kost v. Bender*, 25 Mich. 515.

estopped by his admissions to him or to the payee.¹¹³ In an action by the payee, the acceptor cannot set up equities between himself and the drawer, although he had funds of the drawer in his hands at the time of acceptance.¹¹⁴ So, he cannot set up a want of consideration between himself and the drawer, although the payee obtained the bill before acceptance.¹¹⁵ So, a guarantor cannot set up fraud on himself by the maker as against a payee who had no notice of it.¹¹⁶ And, as against such payee, the maker or surety cannot set up that the note was given on condition of another surety being added before delivery.¹¹⁷ But, where a note is made to A. for goods sold by B. with a warranty, a breach of B.'s warranty is admissible in an action brought against the maker by A., although he knew nothing of it.¹¹⁸ On the other hand, where A. gave his note to C. in payment of his own debt to B., and of B.'s debt to C., he cannot set up against C. a defense which would have been available as against B.¹¹⁹

Defense against Holder with Notice.

§ 1876. Where the purchaser takes a bill or note with notice, he is subject to defense like the payee. Thus, the maker may set up against such holder that he had retired from a partnership before the firm note was delivered;¹²⁰ or that the consideration was illegal;¹²¹ or that the note was given expressly on condition of another surety being added,¹²² or on conditions as to purchase of goods or other consideration.¹²³ So, he may show that the note

¹¹³ *Nichols v. Levins*, 15 Iowa, 362.

¹¹⁴ *Flournoy v. Bank*, 78 Ga. 222, 2 S. E. 547.

¹¹⁵ *Arpin v. Owens*, 140 Mass. 144, 3 N. E. 25.

¹¹⁶ *Davis Sewing-Mach. Co. v. Buckles*, 89 Ill. 237.

¹¹⁷ *Jordan v. Jordan*, 10 Lea (Tenn.) 124.

¹¹⁸ *Aldrich v. Stockwell*, 9 Allen (Mass.) 45.

¹¹⁹ *Adams v. Power*, 48 Miss. 450.

¹²⁰ *Robb v. Mudge*, 14 Gray (Mass.) 534.

¹²¹ *Wiggin v. Bush*, 12 Johns. (N. Y.) 306; *Jacobs v. Mitchell*, 48 Ohio St. 601, 22 N. E. 768. So, as to usury, *Zabriskie v. Spielman*, 46 N. J. Law, 35.

¹²² See §§ 187, 916, *supra*.

¹²³ *McFadden v. Maxwell*, 17 Johns. (N. Y.) 188; *Belleville Sav. Bank v. Bornman* (Ill. Sup.) 10 N. E. 552; *Murray v. Reed*, 17 Wash. 1, 48 Pac. 343.

was obtained by fraud;¹²⁴ especially where it was nonnegotiable.¹²⁵ So, he may show that it was for accommodation for a particular purpose, which had failed or been disregarded;¹²⁶ or that the accommodated party had fraudulently diverted the paper.¹²⁷ But the mere fact of its being accommodation paper constitutes no defense even against a party with notice.¹²⁸

A release may be set up, in like manner, against a purchaser with notice.¹²⁹ But the fact that the plaintiff purchased with notice that the note was given for an insurance premium will not render a claim of the maker against the company admissible without further notice.¹³⁰ And a set-off may be available against the payee, and not against a purchaser for value before maturity who had notice of it.¹³¹

Defense against Purchaser without Indorsement.

§ 1877. Where the purchaser of a bill or note takes it without indorsement, unless it is transferable by delivery, he will be subject to such defenses as are available against the payee.¹³² But it is sufficient for his protection if the note is indorsed before maturity,

¹²⁴ *Fowler v. Brantly*, 14 Pet. 318; *Fisher v. Leland*, 4 Cush. (Mass.) 456; *First Nat. Bank of Chelsea v. Goodsell*, 107 Mass. 149; *Burrill v. Stevens*, 73 Me. 395; *Platt v. Jerome*, 2 Blatchf. 186, Fed. Cas. No. 11,217; *Gilman v. Railroad Co.*, 72 Ala. 566; *Bank of Tennessee v. Johnson*, 1 Swan (Tenn.) 217; *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632. As to payments made after notice, *De Mott v. Starkey*, 3 Barb. Ch. (N. Y.) 403.

¹²⁵ *Hamilton v. Insurance Co.*, 65 Ga. 750.

¹²⁶ *Chit. Bills*, 250; *Lloyd v. Davis*, 3 Law J. K. B. 38; *Small v. Smith*, 1 Denio (N. Y.) 583; *Holbrook v. Mix*, 1 E. D. Smith (N. Y.) 154; *Prall v. Hinchman*, 6 Duer (N. Y.) 351; *Wagner v. Diedrich*, 50 Mo. 484; *Moulton v. Posten*, 52 Wis. 169; *Stone v. Vance*, 6 Ohlo, 246.

¹²⁷ Especially where the transfer was also usurious. *Powell v. Waters*, 8 Cow. (N. Y.) 669, affirming 17 Johns. (N. Y.) 176. And see § 526, *supra*.

¹²⁸ See § 561, *supra*.

¹²⁹ *Case Wagon Co. v. Wolfenden*, 63 Wis. 185, 23 N. W. 485.

¹³⁰ *Barker v. Valentine*, 10 Gray (Mass.) 341.

¹³¹ *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10. See § 1882, *infra*. But, where the note was fraudulently transferred by the payee to evade the set-off, an indorsee with notice was held subject to it as a trustee for the payee. *Hillhouse v. Adams*, 57 Conn. 153, 17 Atl. 698.

¹³² *Weber v. Orten*, 91 Mo. 677, 4 S. W. 271. E. g. want of consideration, *Camp v. Sturdevant*, 16 Neb. 693, 21 N. W. 449; or an agreement for exten-

Ch. 47) DEFENSE AGAINST HOLDER WITHOUT CONSIDERATION. § 1878

although previously transferred by delivery only.¹³³ Where one takes from the payee by assignment for the benefit of creditors, he is in like manner subject to defenses existing against the payee.¹³⁴ So, where a note is made payable to A., and delivered without indorsement in the first instance to B., the latter will be subject to defense as payee.¹³⁵ And where one purchases in good faith, but under a forged indorsement, he takes the paper subject to defense like a purchaser without indorsement.¹³⁶

Defense against Holder without Consideration—Pledgee.

§ 1878. One who takes a note without consideration takes it subject to defense.¹³⁷ So, where the drawee pays drafts out of the drawer's funds in hand, and holds them as vouchers, they are open to equities between himself and the drawer.¹³⁸ And, where one purchases a note for less than its face, he is only entitled to protection against defenses to the extent of the consideration paid.¹³⁹ So, where he purchases stolen bank bills at a discount below their market value, and after they have been protested.¹⁴⁰

One who holds commercial paper as a pledgee is protected as a bona fide holder,¹⁴¹ but not beyond the amount of the debt secured

sion, *Ferguson v. Hill*, 3 Stew. (Ala.) 485; or for another surety, *Gibson v. Miller*, 29 Mich. 355; or not to transfer, *Trust Co. v. National Bank*, 101 U. S. 68; or a part payment, *Dunn v. Meserve*, 58 N. H. 429. And see §§ 789, 989, *supra*; and as to the effect of indorsement without recourse, § 722, *supra*, and restrictive indorsement, § 727, *supra*.

¹³³ *Irwin v. Bailey*, 8 Biss. 523, Fed. Cas. No. 7,079.

¹³⁴ *Sims v. Wilson*, 47 Ind. 226.

¹³⁵ E. g. of usury, *Marvin v. McCullum*, 20 Johns. (N. Y.) 288; or fraud, *Boody v. Bartlett*, 42 N. H. 558.

¹³⁶ *Rowe v. Putnam*, 131 Mass. 281.

¹³⁷ E. g. usury, *Harpham v. Haynes*, 30 Ill. 405; or fraud, *Millard v. Barton*, 13 R. I. 601; *Sawyer v. Wiswell*, 9 Allen (Mass.) 39. And see § 990 *et seq.*, *supra*.

¹³⁸ *Randall v. Weld*, 86 Pa. St. 357.

¹³⁹ *Holcomb v. Wyckoff*, 35 N. J. Law, 35. And see §§ 452, 994, *supra*.

¹⁴⁰ *Olmstead v. Bank*, 32 Conn. 278.

¹⁴¹ *Saloy v. Bank*, 39 La. Ann. 90, 1 South. 657; *Doane v. King*, 30 Fed. 106; *Partridge v. Williams*, 72 Ga. 807. So, by statute in GEORGIA (Code, § 3697).

by the pledge.¹⁴² As to the excess, it is admissible to show failure of the original consideration,¹⁴³ or a part payment, or other defense.¹⁴⁴ But where a certificate is assigned expressly for value, and pledged by the assignee, the pledgee may hold it as security for his debt, notwithstanding an agreement between the original parties to the transfer for its return on a certain condition.¹⁴⁵ Where the pledge is usurious, the maker may set up a payment made to the payee without notice of the transfer.¹⁴⁶ It is, however, no defense against a pledgee to show that the note was pledged to him as collateral security for a verbal agreement.¹⁴⁷

Defense against Purchaser after Maturity.

§ 1879. Defenses are, in general, admissible against a purchaser after maturity as against the original payee.¹⁴⁸ And this is expressly provided by statute in some states.¹⁴⁹ And in Illinois intermediate defenses also are reserved as against such holder.¹⁵⁰ The rule subjecting a purchaser after maturity to defenses available against the payee applies also to negotiable coupon bonds,¹⁵¹ and to the coupons

¹⁴² *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Chicopee Bank v. Chapin*, 8 Metc. (Mass.) 40; *International Bank v. German Bank*, 71 Mo. 183. And see §§ 799, 800, *supra*.

¹⁴³ *Exchange Bank v. Butner*, 60 Ga. 654.

¹⁴⁴ *Bond v. Fitzpatrick*, 8 Gray (Mass.) 536; or fraud, *Carpenter v. Bank*, 106 Pa. St. 171.

¹⁴⁵ *Moore v. Bank*, 55 N. Y. 41.

¹⁴⁶ *Caswell v. Railroad Co.*, 50 Ga. 70.

¹⁴⁷ *Walker v. Crawford*, 56 Ill. 444.

¹⁴⁸ *Davis v. Briggs*, 39 Me. 304; *Paine v. Railroad Co.*, 118 U. S. 152, 6 Sup. Ct. 1019; *Smith v. Lawson*, 18 W. Va. 212; *Lanata v. Bayhl*, 31 La. Ann. 229; *McNitt v. Helm*, 33 Iowa, 342; *British American Mortg. Co. v. Smith*, 45 S. C. 83, 22 S. E. 747. Although the note purported on its face to have been indorsed before maturity. *Goodson v. Johnson*, 35 Tex. 622. And irrespective of the good faith of the indorsee. *Pugh v. Grant*, 86 N. C. 39. And see § 674, *supra*.

¹⁴⁹ COLORADO (Mills' Ann. St. § 248); GEORGIA (Code, § 3695); KANSAS (Gen. St. c. 115, § 2); NEBRASKA (Comp. St. § 3383); MINNESOTA (Gen. St. c. 66, § 27). So, by the Negotiable Instruments Law in COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 58), MARYLAND (§ 77), and NEW YORK (§ 97).

¹⁵⁰ ILLINOIS (Hurd's Rev. St. c. 98, § 11).

¹⁵¹ *National Bank of Washington v. Texas*, 20 Wall. 72; *Texas v. White*, (2624)

themselves,¹⁵² and to bank bills.¹⁵³ But the burden is on the defendant, who sets up want of original consideration or other defense against a purchaser after maturity.¹⁵⁴ Failure of consideration is, however, admissible as a defense in such case, although the maker has already filed a bill in equity against the payee to have the note canceled.¹⁵⁵ The fact that a note was given for the payee's accommodation is no defense against a purchaser after maturity, who had no notice of that fact,¹⁵⁶ unless the proceeds were diverted by the payee from the purpose originally agreed on with the accommodation maker.¹⁵⁷ In like manner, a breach of condition for another surety may be set up against one who takes the note after maturity and for collection only.¹⁵⁸ So, a contemporaneous agreement for indemnity as a condition to the maker's liability may be set up against a purchaser after maturity;¹⁵⁹ or a condition for a return of the note to the accommodation maker.¹⁶⁰

§ 1880. — A purchaser after maturity is, in like manner, subject to the defense that the paper was given for an illegal consideration,¹⁶¹ or was usurious,¹⁶² or had been paid, in whole or part,¹⁶³ or was procured by fraud;¹⁶⁴ or that it had been satisfied and was

7 Wall. 700; *Texas v. Hardenberg*, 10 Wall. 68; *Greenwell v. Haydon*, 78 Ky. 333.

¹⁵² *Hinckley v. Bank*, 131 Mass. 147. Especially where they are not in form negotiable. *Evertson v. Bank*, 66 N. Y. 14, reversing 4 Hun (N. Y.) 692.

¹⁵³ *Burroughs v. Bank*, 70 N. C. 283.

¹⁵⁴ *Lipsmeler v. Vehslage*, 29 Fed. 175.

¹⁵⁵ *Wiltzie v. Northam*, 3 Bosw. (N. Y.) 162.

¹⁵⁶ *Renwick v. Williams*, 2 Md. 356. And see § 677, *supra*.

¹⁵⁷ *Long v. Rhawn*, 75 Pa. St. 128.

¹⁵⁸ *Stricklin v. Cunningham*, 58 Ill. 293.

¹⁵⁹ *Youngs v. Little*, 15 N. J. Law, 1.

¹⁶⁰ *Kellogg v. Barton*, 12 Allen (Mass.) 527.

¹⁶¹ *Bissell v. Gowdy*, 31 Conn. 47; *Baucom v. Smith*, 66 N. C. 537.

¹⁶² *Tufts v. Shepherd*, 49 Me. 312; *Kurz v. Holbrook*, 13 Iowa, 562.

¹⁶³ *Walton v. Young*, 26 La. Ann. 164; *Cromwell v. Arrott*, 1 Serg. & R. (Pa.) 180. So, where it was indorsed after maturity "without recourse." *Reichert v. Koerner*, 54 Ill. 306. So, payment of a copy forged by the plaintiff's indorser before transfer to him. *Leach v. Funk*, 97 Iowa, 576, 66 N. W. 768.

¹⁶⁴ *Greenwell v. Haydon*, 78 Ky. 333; *Melendy v. Keen*, 89 Ill. 395; *Clarke v. Dederick*, 31 Md. 148; *Tucker v. Smith*, 4 Me. 415; *Barlow v. Scott's Adm'rs*, 12 Iowa, 63; *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221, 12 N. E. 577. And see §§ 674, 676, *supra*.

to be canceled, but was fraudulently negotiated by the payee many years afterwards;¹⁶⁵ or that it was accommodation paper, and had been fraudulently diverted by the payee;¹⁶⁶ or that it was fraudulently negotiated, and the proceeds misappropriated by the maker's agent,¹⁶⁷ or by his attorney for collection,¹⁶⁸ or by a depositor with whom it was left for a special purpose.¹⁶⁹ So, the maker may show, as against such holder, that it was accommodation paper, and had been fraudulently diverted by the payee from the agreed purpose.¹⁷⁰ So, a purchaser after maturity for value from a thief takes the instrument subject to the defense of payment made at maturity.¹⁷¹ So, where one purchases a lost note two years after its maturity in payment of a debt, he cannot be protected against the owner in an action of trover.¹⁷² In like manner, a purchaser after maturity takes subject to the defense of an accord and satisfaction,¹⁷³ or of a prior release by the payee,¹⁷⁴ or an agreement to release collateral on a part payment.¹⁷⁵

Set-Off against Purchaser after Maturity.

§ 1881. A purchaser after maturity takes subject to set-offs existing against the payee¹⁷⁶ before the transfer of the paper.¹⁷⁷

¹⁶⁵ Cross v. Herr, 96 Ind. 96.

¹⁶⁶ Wheeler v. Barret, 20 Mo. 573; Atkins v. Knight, 46 Ala. 539.

¹⁶⁷ Maples v. Browne, 48 Pa. St. 458.

¹⁶⁸ Eggan v. Briggs, 23 Kan. 710; McCormick v. Williams, 54 Iowa, 50, 6 N. W. 138; Henderson v. Case, 31 La. Ann. 215; Reed v. Warner, 5 Paige (N. Y.) 650.

¹⁶⁹ Goodson v. Johnson, 35 Tex. 622.

¹⁷⁰ Coghlin v. May, 17 Cal. 515; Hoffman v. Foster, 43 Pa. St. 137.

¹⁷¹ Arents v. Com., 18 Grat. (Va.) 750.

¹⁷² Easley v. Crockford, 3 Moore & S. 700, 10 Bing. 243.

¹⁷³ Lord v. Favorite, 29 Ill. 149.

¹⁷⁴ Crossley v. Ham, 13 East, 498. And see § 678, supra.

¹⁷⁵ Howard v. Gresham, 27 Ga. 347.

¹⁷⁶ Sherwood v. Barton, 36 Barb. (N. Y.) 284; Thompson v. McClelland, 29 Pa. St. 475; Lighty v. Brenner, 14 Serg. & R. (Pa.) 127; Sargent v. Southgate, 5 Pick. (Mass.) 312; Bowen v. Thrall, 28 Vt. 382; Elch v. Greeley, 112 Cal. 171, 44 Pac. 483; Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476; Wyman

¹⁷⁷ Shirley v. Todd, 9 Me. 83; Burnham v. Tucker, 18 Me. 179; First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City, 34 Neb. 71, 51 N. W. 305.

And, if the payee repurchases a note after maturity without knowledge of a set-off against his indorser, he will still take subject to it.¹⁷⁸ Under the statute in Massachusetts, a purchaser after maturity is subject to a set-off against the payee or indorser held or acquired by the defendant before notice of transfer.¹⁷⁹ And such set-off may be shown under the general issue.¹⁸⁰ And such holder is subject to a set-off held or acquired before notice of transfer against the payee or any intermediate indorser.¹⁸¹ And this is provided expressly by statute in some other states.¹⁸² But in other states, even against a purchaser after maturity, only such set-offs are admissible as existed against the original payee.¹⁸³ The rule in England and some of the United States, in like manner, excludes as against such purchaser all set-offs arising out of other transactions.¹⁸⁴ But in other states any

v. Robbins, 51 Ohio St. 98, 37 N. E. 264; *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791; *Norton v. Foster*, 12 Kan. 44. So, as to demand note transferred four months after date. *La Due v. Bank*, 31 Minn. 33, 16 N. W. 426. And see §§ 674, 679, *supra*. So, by statute, in TEXAS (Rev. St. art. 265). But not to exceed the note sued on. *Reese v. Teagarden*, 31 Tex. 642.

¹⁷⁸ *Martin v. Richardson*, 68 N. C. 255.

¹⁷⁹ *Sargent v. Southgate*, 5 Pick. 312; *Baxter v. Little*, 6 Metc. 7.

¹⁸⁰ *Stockbridge v. Damon*, 5 Pick. (Mass.) 223. And see *Peabody v. Peters*, *Id.* 1.

¹⁸¹ *Bond v. Fitzpatrick*, 4 Gray (Mass.) 89. But not where the set-off claimed was the maker's liability as surety for the intermediate indorser, which he had not discharged except by giving his own nonnegotiable note for it. *Judah v. Potter*, 18 Ind. 224.

¹⁸² NEW YORK (Code Civ. Proc. § 502); ILLINOIS (Hurd's Rev. St. c. 98, § 12); INDIANA (Horner's Rev. St. § 5504). So, in MISSOURI (*Munday v. Clements*, 58 Mo. 577); and MINNESOTA (*Tuttle v. Wilson*, 33 Minn. 422, 23 N. W. 864; Gen. St. § 499); and WISCONSIN (St. § 2606). The New York statute has been held not to apply to an indorsee before maturity. *Binghamton Trust Co. v. Clark* (Sup.) 52 N. Y. Supp. 941. In Indiana a set-off existing before notice of transfer against an intermediate party is available against a nonnegotiable note, *Huston v. Bank*, 85 Ind. 21; *Cox v. Bank* (Ind. App.) 47 N. E. 841; but only where the defendant was not otherwise indebted to such intermediate party beyond the amount claimed for set-off, *Meeker v. Shanks*, 112 Ind. 207, 13 N. E. 712.

¹⁸³ *Nixon v. English*, 3 McCord (S. C.) 549; *Perry v. Mays*, 2 Bailey (S. O.) 354; *Kennedy v. Manship*, 1 Ala. 43; *McKenzie v. Hunt*, 32 Ala. 494; *Savage v. Bank*, 62 Miss. 586; *Ryan v. Chew*, 13 Iowa, 589. And formerly in Illinois, *Root v. Irwin*, 18 Ill. 147; *Favorite v. Lord*, 35 Ill. 142.

¹⁸⁴ *Benj. Chalm. Dig.* art. 134; 2 *Daniel, Neg. Inst.* 442, 1 *Edw. Bills & N.*

set-off, although arising out of other matters existing against the payee at the time of transfer, is available against a purchaser after maturity.¹⁸⁵

Statutes as to Set-Off.

§ 1882. In some states it is provided by statute that any set-off against the payee is available against indorsees or assignees until notice of transfer, with the exception of negotiable paper,¹⁸⁶ or with the exception of bona fide holders of negotiable paper before maturity.¹⁸⁷ And such exception may be implied from the statute putting inland bills and notes on the footing of foreign bills.¹⁸⁸ In Massachusetts the statute allows all set-offs against the original holder of a demand note acquired before notice of transfer.¹⁸⁹ In Missis-

§ 379; 2 Pars. Notes & B. 603; *Borough v. Moss*, 10 Barn. & C. 558; *Holmes v. Kidd*, 3 Hurl. & N. 891; *Hughes v. Large*, 2 Pa. St. 103; *Haley v. Congdon*, 56 Vt. 65; *Annan v. Houck*, 4 Gill (Md.) 325; *Arnot v. Woodburn*, 35 Mo. 99; *Cutler v. Cook*, 77 Mo. 388; *Barnes v. McMullins*, 78 Mo. 260; *Davis v. Noll*, 38 W. Va. 66, 17 S. E. 791; *Bates v. Kemp*, 13 Iowa, 223; *Robertson v. Breedlove*, 7 Port. (Ala.) 541; *Hankins v. Shoup*, 2 Ind. 342; *Armstrong v. Noble*, 55 Vt. 428. And see §§ 678, 679, *supra*.

¹⁸⁵ *Robinson v. Perry*, 73 Me. 168; *Johnston v. Humphrey*, 91 Wis. 76, 64 N. W. 317. And see § 1852 *et seq.*, *supra*.

¹⁸⁶ ALABAMA (Code, §§ 1765, 2684). So, in KENTUCKY (Ky. St. § 474), whether the set-off is against the payee or an intermediate indorser. And notes payable at, and discounted by, an incorporated bank, are on the footing of foreign bills. *Id.* § 483; *Prather v. Weissiger*, 10 Bush (Ky.) 117. And the Kentucky statute has been held to be constitutional. *Bank v. Wood*, 142 Mass. 563, 8 N. E. 753. Under the Alabama statute such set-off is available against a nonnegotiable note, *Brown v. Scott*, 87 Ala. 453, 6 South. 384; or a negotiable note transferred before maturity without indorsement, *Vann v. Marbury*, 100 Ala. 438, 14 South. 273. And see note to this case in 23 Lawy. Rep. Ann. 325.

¹⁸⁷ CALIFORNIA (Code Civ. Proc. § 368); COLORADO (Code Civ. Proc. § 4); IOWA (Code, § 3461); NEBRASKA (Comp. St. § 5620); SOUTH CAROLINA (Code Civ. Proc. § 133); WISCONSIN (Sanb. & B. Ann. St. § 2606). And see OREGON (Code Civ. Proc. § 72); *Drexler v. Smith*, 30 Fed. 754. But the pledgee of an insolvent corporation (payee) is subject to set-off. *Merchants' Exch. Bank v. Fuddner*, 92 Wis. 415, 66 N. W. 691.

¹⁸⁸ NEW JERSEY (2 Gen. St. p. 2591, § 340; *Id.* p. 2604, §§ 1, 2); INDIANA (Horner's Rev. St. § 5504).

¹⁸⁹ MASSACHUSETTS (Pub. St. c. 77, § 14). The provision for set-off against debts in general, whenever it may be applicable to bills and notes gov-

issippi indorsed notes and bills are subject to set-off acquired before notice of transfer.¹⁹⁰ In Minnesota a purchaser after maturity may cut off all equities accruing after purchase by giving the maker notice of the transfer.¹⁹¹

Set-Off after Transfer and Notice.

§ 1883. In some states the maker may set off any demand existing against the payee before notice of transfer.¹⁹² But such set-off is not admissible against the holder of a note payable to bearer, unless the maker gives the purchaser notice of it.¹⁹³

A set-off acquired against the payee after he had transferred the note is not generally admissible, even against a purchaser after maturity.¹⁹⁴ So, a judgment rendered against the payee after notice of transfer is not available as a set-off against an indorsee, who purchased the note before maturity, but did not obtain an indorsement of it until after.¹⁹⁵ And where a note is transferred before maturity

earned by the law merchant, excludes set-offs for unliquidated damages (with some exceptions, Pub. St. c. 168, § 3), and all set-offs acquired after notice of transfer (§ 10) or commencement of suit (§ 5).

¹⁹⁰ MISSISSIPPI (Ann. Code, § 3503; *Philpps v. Shegogg*, 30 Miss. 241); including instruments negotiable by common law, or by statute, *Brown v. Bank*, 62 Miss. 754; but not including any set-off except those held by the defendant against the party with whom he had contracted directly and immediately, *Savage v. Bank*, 62 Miss. 586. And see § 1885, *infra*.

¹⁹¹ *Linn v. Rugg*, 19 Minn. 181 (Gil. 145); Gen. St. § 5157.

¹⁹² *Martin v. Trobridge*, 1 Vt. 477; *McGowan v. Budlong*, 70 Pa. St. 470. Although acquired after the payee's death, *Kling v. Conn*, 25 Ind. 425. So, formerly, in Virginia, *Stewart v. Anderson*, 6 Cranch, 203; the burden being on the defendant to show that it was acquired before notice, *Ritchie v. Moore*, 5 Munf. (Va.) 388.

¹⁹³ *Parker v. Kendall*, 3 Vt. 540.

¹⁹⁴ *Furniss v. Gilchrist*, 1 Sandf. (N. Y.) 53. Whether without notice of the transfer, *Davis v. Miller*, 14 Grat. (Va.) 1; or after notice, *Linn v. Rugg*, 19 Minn. 181 (Gil. 145). And although it arose out of a prior transaction, *Davis v. Nelligh*, 7 Neb. 84; or was acquired by actual transfer after transfer of the note under a prior agreement for its purchase, *Weader v. Bank*, 126 Ind. 111, 25 N. E. 887. And although the notice was not given by the assignee, *Johnson v. Amana Lodge*, 92 Ind. 150. So, a set-off which arose after notice of transfer, and after action brought by the assignee, *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627; Code Civ. Proc. § 438.

¹⁹⁵ *Follett v. Buyer*, 4 Ohio St. 586. So, in WASHINGTON, other set-off ac-

to a bona fide holder, and afterwards taken up by a surety who brings suit against the maker, his title relates back to that of the bona fide purchaser, and is not subject to a set-off against the payee acquired after notice of the transfer.¹⁹⁶

Defenses against Collateral—Nonnegotiable Paper.

§ 1884. In general, the assignee of mortgages or other securities collateral to negotiable paper takes the collateral subject to equities, although the paper secured is not so.¹⁹⁷ But in some states the collateral is regarded as negotiable also, and not subject to equities existing in favor of the mortgagor.¹⁹⁸

But this construction will not be extended to exclude claims adverse to one another, made by different note holders secured by the same collateral;¹⁹⁹ nor to the statutory right of action given to the creditors of a corporation against its stockholders;²⁰⁰ nor even to

quired after notice of transfer (Code Proc. § 806). *Harrisburg Trust Co. v. Shufeldt*, 31 C. C. A. 190, 87 Fed. 689.

¹⁹⁶ *Lewis v. Faber*, 65 Ala. 460.

¹⁹⁷ *Bacon v. Abbott*, 137 Mass. 397; *Olds v. Cummings*, 31 Ill. 188; *White v. Sutherland*, 64 Ill. 181; *Haskell v. Brown*, 65 Ill. 29; *Bryant v. Vix*, 83 Ill. 11; *Towner v. McClelland*, 110 Ill. 542; *Miller v. Larned*, 103 Ill. 570; *Bouligny v. Fortier*, 17 La. Ann. 121; *Butler v. Slocomb*, 33 La. Ann. 170; *Securities Co. v. Talbert*, 49 La. Ann. 1393, 22 South. 762; *Baily v. Smith*, 14 Ohio St. 396; *Dearman v. Trimmier*, 26 S. C. 506, 2 S. E. 501. So, as to collateral chattel mortgages. *Oster v. Mickley*, 35 Minn. 245, 28 N. W. 710.

¹⁹⁸ *Carpenter v. Longan*, 16 Wall. 271; *Gould v. Marsh*, 1 Hun (N. Y.) 566; *Gabbert v. Schwartz*, 69 Ind. 450; *Duncan v. Louisville*, 13 Bush (Ky.) 385; *Helmer v. Krollick*, 36 Mich. 371; *Barnum v. Phenix*, 60 Mich. 388, 27 N. W. 577; *Cox v. Cayan* (Mich.) 76 N. W. 96; *Spence v. Railway Co.*, 179 Ala. 576; *Thompson v. Maddux* (Ala.) 23 South. 157; *Hart v. Adler*, 109 Ala. 467, 19 South. 894; *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. 73; *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. 611; *First Nat. Bank of Mauch Chunk v. Rohrer*, 138 Mo. 369, 39 S. W. 1047; *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754. So, *Swett v. Stark*, 31 Fed. 858, declining to follow the rule of the state courts in an Illinois case. And see *Humble v. Curtis*, 160 Ill. 193, 43 N. E. 749. So, as to collateral vendor's lien, *Pullen v. Ward*, 60 Ark. 90, 28 S. W. 1084; or collateral chattel mortgage, *Myers v. Hazzard*, 50 Fed. 155. And see *Bailey v. Seymour*, 42 S. C. 322, 20 S. E. 62, where the question was as to estoppel by recital in a collateral mortgage merely.

¹⁹⁹ *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 29 S. W. 903.

²⁰⁰ *Close v. Potter*, 155 N. Y. 145, 49 N. E. 686.

corporation bonds which are negotiable in form, but are held as collateral with an unindorsed note.²⁰¹ Further discussion of the negotiable features of mortgages and other collateral securities is found in works bearing upon the special subject.²⁰²

Nonnegotiable paper, although transferred for value, is subject to all equities.²⁰³ But it is sometimes made subject by statute only to such set-offs as are acquired before notice of transfer.²⁰⁴

Defenses against Bona Fide Holder.

§ 1885. In general, a bona fide purchaser of commercial paper for value before maturity takes clear of all equities between the original or intermediate parties.²⁰⁵ In Massachusetts the statute renders the indorsee of a demand note subject to all defenses existing against the payee, except such as arise after notice of the transfer.²⁰⁶ In Georgia it is provided that a bona fide holder shall be protected from all defenses except forgery, fraud in procurement of the paper, and gaming or immoral or illegal consideration.²⁰⁷

²⁰¹ Thomson-Houston Electric Co. v. Capitol Electric Co., 56 Fed. 849.

²⁰² See Jones, *Mortg.* c. 19.

²⁰³ *Graham v. Willson*, 6 Kan. 489; *Gaines v. Bank* (Ky.) 39 S. W. 438. *E. g.* fraudulent diversion, *Rawlings v. Fisher*, 24 Ind. 52; *Farmers' & Mechanics' Bank v. Hathaway*, 36 Vt. 530; or satisfaction, *Shade v. Creviston*, 93 Ind. 591; or set-off, *Herod v. Snyder*, 48 Ind. 480; *First Nat. Bank of New Windsor v. Bynum*, 84 N. C. 24; *Havens v. Potts*, 86 N. C. 31; *Wetter v. Kiley*, 95 Pa. St. 461; or fraud, *Wickham v. Grant*, 28 Kan. 517; *Kastner v. Pribilinski*, 96 Ind. 229. So, as to the acceptance of a draft in negotiable form by a building and loan association having no such power. *Towle v. Investment Co.*, 78 Fed. 688.

²⁰⁴ IOWA (Code, § 3044); TEXAS (Rev. St. arts. 309, 311); VIRGINIA (Code, §§ 2860, 2861); WEST VIRGINIA (Code, c. 99, §§ 14, 15).

²⁰⁵ *Blair v. Rutherford*, 31 Tex. 465; *Bremmerman v. Jennings*, 60 Ind. 175; *Cook v. Norwood*, 106 Ill. 558; *Gardner v. Maxwell*, 27 La. Ann. 561; *Taylor v. Bowles*, 28 La. Ann. 294; *Holden v. Clark*, 16 Kan. 346; *Morrison v. Fishel*, 64 Ind. 177; *Thompson v. Gibson*, 1 Mart. N. S. (La.) 150. And this is expressly proved by statute in COLORADO (Mills' Ann. St. § 250).

²⁰⁶ MASSACHUSETTS (Pub. St. c. 77, § 14); *Spring v. Lovett*, 11 Pick. 417; *Aldrich v. Stockwell*, 9 Allen, 45. But this does not permit a defense, which could not have been set up against, because he was also one of the makers and could not sue his co-makers. *Thayer v. Buffum*, 11 Metc. 398.

²⁰⁷ GEORGIA (Civ. Code, § 3694). And notes were subject to defenses in ARKANSAS until 1873, *Worthington v. Curd*, 22 Ark. 277, unless the note contained the words "without defalcation," *Woodruff v. Webb*, 32 Ark. 612.

In Indiana, promissory notes payable at a bank in the state of Indiana are put upon the footing of foreign bills of exchange, as we have seen.²⁰⁸ As to other (nonnegotiable) notes and bills of exchange and bonds, defenses available to the maker against the payee before notice of transfer, or to a remote indorser against his indorsee, are admissible against the plaintiff indorsee.²⁰⁹

The Negotiable Instrument Law now in force in several states provides somewhat ambiguously that a bona fide holder holds free from any defect of title of prior parties, and free from defenses available to prior parties among themselves.²¹⁰ This language seems to be copied in part from the British Bills of Exchange Act.²¹¹

In Mississippi, in notes and bills transferred by indorsement or assignment, the defendant has "the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and set-offs made, had, or possessed against the same previous to notice of assignment, in the same manner as though the suit had been brought by the payee."²¹² This statute applies to notes negotiable by the law merchant or by statute,²¹³ and is not waived by a waiver of "all defenses."²¹⁴ But it does not apply to instruments payable to bearer, and transferable by delivery,²¹⁵ or payable in another state;²¹⁶ nor to accommodation paper.²¹⁷

²⁰⁸ See § 128, *supra*.

²⁰⁹ INDIANA (Horner's Rev. St. §§ 5503-5505). "Whatever defense or set-off the maker of any such instrument had before notice of assignment against an assignor or against the original payee, he shall have also against their assignee" (§ 5503). The indorser "shall have any defense which he might have had in a suit brought by his immediate assignee" (§ 5504).

²¹⁰ COLORADO, CONNECTICUT, FLORIDA, VIRGINIA (§ 57), MARYLAND (§ 76), and NEW YORK (§ 96).

²¹¹ Bills of Exchange Act, § 38, "mere personal defenses available," etc.

²¹² MISSISSIPPI (Ann. Code, § 3503).

²¹³ *Brown v. Bank*, 62 Miss. 754.

²¹⁴ *Union Nat. Bank v. Fraser*, 63 Miss. 231.

²¹⁵ *Craig v. Vicksburg*, 31 Miss. 216; *Stokes v. Winslow*, Id. 518; *Mercien v. Cotton*, 34 Miss. 64; *Winstead v. Davis*, 40 Miss. 785. Or payable to the maker's order and indorsed by him in blank. *Bank of Winona v. Wofford*, 71 Miss. 711, 14 South. 262.

²¹⁶ *Emanuel v. White*, 34 Miss. 56; *Coffman v. Bank*, 41 Miss. 212; *Harrison v. Pike*, 48 Minn. 46.

²¹⁷ *Meggett v. Baum*, 57 Miss. 22.

Defenses as to Capacity—Authority.

§ 1886. Where a bond or other negotiable instrument is executed by a corporation without legal authority, it may set up such defense even against a bona fide holder.²¹⁸ And this is true where the statute authorized the giving of such bond, but did not comply with the constitutional requirements, and was therefore ineffectual.²¹⁹ But, where a corporation note is executed under a sufficient apparent authority, it will be valid in the hands of a bona fide holder.²²⁰ Other defenses, going to show that no valid contract was ever made because of the parties' legal incapacity, are admissible against all holders where they are not waived or barred. Thus, it may be shown that the maker was an infant,²²¹ or a lunatic,²²² or a married woman, without statutory authority to bind herself.²²³ But the maker can-

²¹⁸ *Bissell v. Kankakee*, 64 Ill. 249; *Williamson v. Keokuk*, 44 Iowa, 88; *Anthony v. Jasper Co.*, 4 Dill. 136, Fed. Cas. No. 488, affirmed in 101 U. S. 693; *Bank of Chillicothe v. Dodge*, 8 Barb. 233. And see § 343, *supra*.

²¹⁹ *South Ottawa v. Perkins*, 94 U. S. 260. But not if authorized by law, but actually issued for unconstitutional purposes. *Kerr v. Corry*, 105 Pa. St. 282. So, it cannot set up mere noncompliance with a by-law as to manner of execution. *National Spraker Bank of Canajoharie v. George C. Treadwell Co.*, 80 Hun, 363, 30 N. Y. Supp. 77.

²²⁰ *Genesee Co. Sav. Bank v. Michigan Barge Co.*, 52 Mich. 438, 18 N. W. 206; *Lehigh Val. Coal Co. v. West Depere Agricultural Works*, 63 Wis. 45, 22 N. W. 831. So, if it was issued without authority, *Pittsburg, C., C. & St. L. Ry. Co. v. Lynde*, 55 Ohio St. 23, 44 N. E. 596; or in violation of its foreign charter, *Ellsworth v. Railroad Co.*, 98 N. Y. 553, reversing 33 Hun, 7. And see § 334, *supra*. So, although it was accommodation paper, *Farmers' Nat. Bank of Valparaiso v. Sutton Mfg. Co.*, 3 C. C. A. 1, 52 Fed. 191; *American Trust & Savings Bank v. Gluck*, 68 Minn. 129, 70 N. W. 1085; *Jacobs Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171; *Marshall Nat. Bank v. O'Neal*, 11 Tex. Civ. App. 640, 34 S. W. 344; or in other respects *ultra vires*, *Clifton Forge v. Brush Electric Co.*, 92 Va. 289, 23 S. E. 288.

²²¹ *Howard v. Simpkins*, 70 Ga. 322.

²²² *Moore v. Hershey*, 90 Pa. St. 196; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040.

²²³ *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, 6 N. W. 88; *Linderman v. Farquharson*, 101 N. Y. 434, 5 N. E. 67; *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. 575; *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804. But see, *contra*, *Perkins v. Rowland*, 69 Ga. 661; *Laster v. Stewart*, 89 Ga. 181, 15 S. E. 42. And see § 294, *supra*.

not set up, against a bona fide indorsee, that the payee had no authority to transfer a note.²²⁴

Want of Consideration.

§ 1887. In general, the maker cannot set up against a bona fide holder an original want of consideration for the paper;²²⁵ or that the consideration was an illegal one;²²⁶ or that the note was given for the payee's accommodation;²²⁷ or that the original consideration had failed.²²⁸

²²⁴ *City Bank of New Haven v. Perkins*, 29 N. Y. 554. Or the indorsee not authorized to purchase. *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Wolke v. Kuhne*, 109 Ind. 313, 10 N. E. 116. And see §§ 244, 271, 390, 1866, *supra*.

²²⁵ *Goddard v. Lyman*, 14 Pick. (Mass.) 268; *Robertson v. Williams*, 5 Munf. (Va.) 381; *McKenna v. Dowdall*, 8 Ir. C. L. R. 70; *Daniels v. Wilson*, 21 Minn. 530; *Battalora v. Earth*, 25 La. Ann. 318; *Harrison v. Pike*, 48 Miss. 46,—as to a Louisiana note; *Hardie v. Wright*, 83 Tex. 345, 18 S. W. 615; *Henertematte v. Morris*, 101 N. Y. 63, 4 N. E. 1; *Blue Valley Lumber Co. v. Smith*, 48 Neb. 293, 67 N. W. 159; *Proctor v. Baldwin*, 82 Ind. 370. But it will be available as to excess over debt secured to a bona fide pledgee. *Brown v. Callaway*, 41 Ark. 418. And see §§ 557–559, *supra*.

²²⁶ *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619; *Ferriss v. Tavel*, 87 Tenn. 386, 11 S. W. 93.

²²⁷ *Arbouin v. Anderson*, L. R. 1 Q. B. 498; *Pitts v. Foglesong*, 37 Ohio St. 676; *Bank v. Rider*, 58 N. H. 512; *Atkinson v. Brooks*, 26 Vt. 569; *Montross v. Clark*, 2 Sandf. (N. Y.) 115; *Lathrop v. Morris*, 5 Sandf. (N. Y.) 7; *National Bank of Republic v. Young*, 41 N. J. Eq. 531, 7 Atl. 488; *Pelree v. Butler*, 14 Mass. 303; *Macy v. Kendall*, 33 Mo. 164; *Bank v. Anderson*, 32 S. C. 538, 11 S. E. 379; *Hall v. Bank*, 133 Ill. 234, 24 N. E. 546; *Estes v. Bank*, 62 Ark. 7, 34 S. W. 85. So, the nonperformance of an executory contract constituting the consideration. *Fink v. Chambers*, 95 Mich. 508, 55 N. W. 375; *Anderson v. Bank*, 98 Mich. 543, 57 N. W. 808; *Porter v. English*, 17 App. Div. 432, 45 N. Y. Supp. 182. And see § 476, *supra*.

²²⁸ *Mobile Sav. Bank v. Board of Sup'rs of Oktibbeha Co.*, 22 Fed. 580; *Powers v. Ball*, 27 Vt. 662; *Bremmerman v. Jennings*, 61 Ind. 334; *Morris v. White*, 28 La. Ann. 855; *Bullock v. Wilcox*, 7 Watts (Pa.) 328; *Munn v. McDonald*, 10 Watts (Pa.) 270; *Mornyier v. Cooper*, 35 Iowa, 257; *Kline v. Spahr*, 56 Ind. 296; *Murphy v. Lucas*, 58 Ind. 360; *Elchelberger v. Bank*, 103 Ind. 401, 3 N. E. 127; *Fisk v. Miller*, 63 Cal. 367; *Miller v. Pollock*, 99 Pa. St. 202; *Union Bank v. Crine*, 33 Fed. 809; *Evans v. Hardware Co. (Ark.)* 45 S. W. 370; *Kelly v. Smith*, 1 Metc. (Ky.) 313; *Blackmer v. Phillips*, 67 N. C. 340. But see, *contra*, under the MISSISSIPPI statute (Code, § 3503), as against an indorsee, *Etheridge v. Gallagher*, 55 Miss. 458; *Robertshaw v. Britton*, 74

Conditions.

§ 1888. The maker, in like manner, cannot set up against a bona fide holder another agreement or condition between himself and the payee;²²⁹ nor the indorser, an agreement that he should not be held liable.²³⁰ And, in general, such holder is not subject to any condition not apparent on the face of the paper.²³¹ Thus, it cannot be shown that the indorsement or signature was conditioned on the signature of another indorser or co-surety,²³² or of a different co-surety from the one who signed it.²³³ And knowledge on the plaintiff's part that A. had refused to sign the paper as surety will not affect his right to recover, if he had no knowledge of the stipulation by the

Miss. 873, 21 South. 523; and under the KENTUCKY statute (Gen. St. c. 22, §§ 6, 21) as to a note payable at a bank in Kentucky, but negotiated in Massachusetts, *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753.

²²⁹ *Brown v. Spofford*, 95 U. S. 474; *Moore v. Miller*, 6 Lans. (N. Y.) 396; *Wooten v. Inman*, 33 Ga. 41; *Davidson v. Powell*, 114 N. C. 575, 19 S. E. 601; *Jennings v. Todd*, 118 Mo. 296, 24 S. W. 148. E. g. that it should be paid only out of a particular fund, and should not be negotiated, *Franc v. Dickinson*, 52 Hun, 373, 5 N. Y. Supp. 303; or that it should be taken up by the payee, *Mayer v. Mode*, 14 Hun (N. Y.) 155; or that the number of bonds to be issued should not exceed 300 (as against other creditors looking to the same collateral security, and holding the first 300 bonds), *McMurray v. Moran*, 134 U. S. 150, 10 Sup. Ct. 427.

²³⁰ *Hill v. Shields*, 81 N. C. 250; *Rice v. Ragland*, 10 Humph. (Tenn.) 545; or that the note was indorsed as collateral only, and not absolute payment, *Shirk v. North*, 138 Ind. 210, 37 N. E. 590; or that bank checks to a depositor's order should be used only as memoranda of deposits, *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355. But an agreement that the indorser should not be liable may be proved to explain the indorsement of a nonnegotiable note. *Birleback v. Wilkins*, 22 Pa. St. 26.

²³¹ *Merritt v. Duncan*, 7 Heisk. (Tenn.) 156. But see, if contained in a separate receipt, *Adams v. Robinson*, 69 Ga. 627.

²³² *Bank of Missouri v. Phillips*, 17 Mo. 29; *Passumpsic Bank v. Goss*, 31 Vt. 315; *Dixon v. Dixon*, Id. 450; *Smith v. Moberly*, 10 B. Mon. (Ky.) 266; *Whitcomb v. Miller*, 90 Ind. 384; *Bonner v. Nelson*, 57 Ga. 433; *Tabor v. Bank*, 48 Ark. 454, 3 S. W. 805; *First Nat. Bank of Freeport v. Compo-Board Mfg. Co.*, 61 Minn. 274, 63 N. W. 731; *Bank of Topeka v. Nelson*, 58 Kan. 815, 49 Pac. 155; *Lookout Bank of Morristown v. Aull*, 93 Tenn. 645, 27 S. W. 1014; *Davis v. Gray*, 61 Tex. 500; *Brumback v. Bank*, 46 Neb. 540, 65 N. W. 198.

²³³ *Ward v. Hackett*, 30 Minn. 150, 14 N. W. 578; *Micklewait v. Noel*, 69 Iowa, 344, 28 N. W. 630.

maker for A.'s signature.²³⁴ The maker of a note cannot even set up against a bona fide holder that the note was delivered to an agent on condition that it should not be delivered to the principal (the vendor of a machine) until the machine had been tried and found satisfactory;²³⁵ or that it was delivered to the maker's agent for delivery on a condition which was not performed.²³⁶ But he may show that the note was delivered in escrow only, and taken and transferred in violation of its conditions.²³⁷ So, he may show that the note was altered by detaching a stub containing a condition, to which it was attached in the maker's book.²³⁸

Illegality as a Defense.

§ 1889. Even the fact that the instrument is illegal or made on an illegal consideration is no defense to a bona fide holder,²³⁹ unless the statute renders the instrument void. Thus, the maker of a note "given for a patent right" cannot set up the omission of such words, although they are required by statute.²⁴⁰ So, if a note is dated on a week day, the maker cannot set up against a bona fide holder that it was actually made on Sunday.²⁴¹ On the other hand, where the

²³⁴ *Davis v. Gray*, 61 Tex. 506.

²³⁵ *Graff v. Logue*, 61 Iowa, 704, 17 N. W. 171.

²³⁶ *Chase Nat. Bank of City of New York v. Faurot*, 149 N. Y. 536, 44 N. E. 164, affirming 72 Hun, 373, 25 N. Y. Supp. 447.

²³⁷ And a corporation note may be delivered in escrow to one of its own directors, *Andrews v. Thayer*, 30 Wis. 228; but not to the payee, *Garner v. Flite*, 93 Ala. 405, 9 South. 367. As to fraudulent diversion of the paper, see § 1894, *infra*. As to delivery in escrow, see § 227, *supra*.

²³⁸ *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382.

²³⁹ *Maddox v. Graham*, 2 Metc. (Ky.) 56 (coupon bonds). So, a note given for an illegal sale of liquor, *Hapgood v. Needham*, 59 Me. 442; or for stock margins, *Third Nat. Bank v. Tinsley*, 11 Mo. App. 498; or the renewal of a note for a gaming debt, *Calvert v. Williams*, 64 N. C. 168; or a note pledged for a gambling debt, *Albertson v. Laughlin*, 173 Pa. St. 525, 34 Atl. 216; or given to a foreign company not complying with statute, *Williams v. Cheney*, 3 Gray (Mass.) 215; *Hart v. Machine Co.*, 72 Miss. 809, 17 South. 769. And see § 559, *supra*, and, as to illegal considerations generally, see chapter 14, *supra*.

²⁴⁰ *New v. Walker*, 108 Ind. 365, 9 N. E. 386; *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316; *Harmon v. Hagerty*, 88 Tenn. 705, 13 S. W. 690. And see § 86, *supra*.

²⁴¹ *Cranston v. Goss*, 107 Mass. 439; *Ball v. Powers*, 62 Ga. 757; *Clinton Nat.* (2636)

statute makes the contract void, the illegality may be set up against a bona fide holder.²⁴² But a provision that a note given for intoxicating liquor "shall be deemed to be received in violation of law, without consideration, against law, equity, and good conscience," does not make the paper void.²⁴³

Usury Affecting Bona Fide Holder.

§ 1890. The defense of usury, like other illegality, cannot, in general, be set up against a bona fide holder,²⁴⁴ although he purchased the paper at a usurious discount from the payee, for whose accom-

Bank v. Graves, 48 Iowa, 228; *Beman v. Wessels*, 53 Mich. 549, 19 N. W. 179; *Leightman v. Kadetska*, 58 Iowa, 676, 12 N. W. 736; *Vinton v. Peck*, 14 Mich. 287; *Bank of Cumberland v. Mayberry*, 48 Me. 198; *Harrison v. Powers*, 76 Ga. 218.

²⁴² E. g. under the statute against gaming. *Pace v. Martin*, 2 Duv. (Ky.) 522; *Lucas v. Waul*, 12 Smedes & M. (Miss.) 157; *Unger v. Boas*, 13 Pa. St. 601; *Pearce v. Rice*, 142 U. S. 28, 12 Sup. Ct. 130; *Harper v. Young*, 112 Pa. St. 419, 3 Atl. 670; or for "futures," *Snoddy v. Bank*, 88 Tenn. 573, 13 S. W. 127; *Pope v. Hanke*, 155 Ill. 617, 40 N. E. 839; *Cunningham v. Bank*, 71 Ga. 400; *Root v. Merriam*, 27 Fed. 909 (Illinois statute); *Traders' Bank of Chicago v. Alsop*, 64 Iowa, 97, 19 N. W. 863. But see contra, as to futures, *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713; *Northern Nat. Bank of Lancaster v. Arnold* (Pa. Sup.) 40 Atl. 794; or prohibiting notes to an attorney for services, *Weed v. Bond*, 21 Ga. 195; or the issue of circulating notes, *Root v. Wallace*, 4 McLean, 8, Fed. Cas. No. 12,039. But not so under the New York banking act, *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; nor under the United States statutes prohibiting certification of checks by national banks in excess of deposits, Rev. St. U. S. § 5208; *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66; or notes to creditors in consideration of withdrawing opposition to a bankruptcy discharge, *Rhodes v. Beall*, 73 Ga. 641; the statutory declaration that such note was void (Rev. St. U. S. § 5131) being confined by construction to the original parties.

²⁴³ *Cazet v. Field*, 9 Gray (Mass.) 329.

²⁴⁴ *Hemenway v. Cropsey*, 37 Ill. 358; *Odell v. Greenly*, 4 Duer (N. Y.) 358; *Coor v. Spicer*, 65 N. C. 401; *Dickerman v. Day*, 31 Iowa, 444; *Gross v. Funk*, 20 Kan. 655; *Wortendyke v. Meehan*, 9 Neb. 221, 2 N. W. 339; *Farmers' & Mechanics' Bank of Genesee v. Parker*, 37 N. Y. 148 (as to Ohio law); *Orr v. Sparkman* (Ala.) 23 South. 829; *Cheney v. Cooper*, 14 Neb. 415, 16 N. W. 471; *Sedgwick v. Dixon*, 18 Neb. 545, 26 N. W. 247; *Cheney v. Janssen*, 20 Neb. 128, 29 N. W. 289; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88; *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 22 S. E. 487 (since 1873). So, at suit of an "innocent purchaser," *Robinson v. Smith*, 62 Minn. 62, 64 N. W. 90;

modation it was made.²⁴⁵ So, usury by one (not himself a party) for whose benefit the note was made cannot be set up against such holder.²⁴⁶ And some statutes expressly provide that a bona fide purchaser of negotiable paper before maturity shall not be subject to the defense of usury.²⁴⁷ But in England usury formerly rendered a bill void even in the hands of a bona fide holder.²⁴⁸ And this was the law in Massachusetts for a short time,²⁴⁹ and formerly in Maryland.²⁵⁰ So, it has been held in Iowa that the statutory penalty for usury renders the contract void and the usury admissible against a bona fide holder.²⁵¹ But in Ohio a statute making such contracts "unlawful" does not render them void as against such holder.²⁵² In Virginia usury may be set up against a bona fide holder by a municipal corporation sued on a negotiable bond.²⁵³

Fraud as Affecting Bona Fide Holders.

§ 1891. The defense of fraud is, in general, inadmissible against a bona fide holder of commercial paper.²⁵⁴ Thus, the defendant can-

Gen. St. § 2214. And see § 525, *supra*. But see *contra*, *Laramore v. Bank*, 69 Ga. 722; *Angier v. Smith*, 101 Ga. 844, 28 S. E. 167.

²⁴⁵ *Otto v. Durege*, 14 Wis. 571; *Ramsey v. Clark*, 4 Humph. (Tenn.) 244.

²⁴⁶ *Willson v. Knight*, 59 Ala. 172.

²⁴⁷ IOWA (Code, § 3042); MARYLAND (Pub. Gen. Laws, art. 49, § 2); MICHIGAN (How. Ann. St. § 1596); MINNESOTA (Gen. St. § 2214). For American usury statutes, see § 521, *supra*. But the party first acquiring an accommodation note in effect the payee, and subject to defense as such. *Rodecker v. Littauer*, 8 C. C. A. 320, 59 Fed. 857; *Aeby v. Rapelye*, 1 Hill (N. Y.) 9.

²⁴⁸ *Young v. Wright*, 1 Camp. 139.

²⁴⁹ *Knapp v. Briggs*, 2 Allen (Mass.) 551. So, where the note was to the maker's order, and purchased from his agent, without notice that it was for his benefit. *Sylvester v. Swan*, 5 Allen (Mass.) 134. Or from an accommodated payee at a large discount. *Whitten v. Hayden*, 7 Allen (Mass.) 407. But the statute only applied to subsequent contracts. *North Bridgewater Bank v. Copeland*, Id. 139.

²⁵⁰ *Cockey v. Forrest*, 3 Gill & J. (Md.) 482.

²⁵¹ *Bacon v. Lee*, 4 Iowa, 490.

²⁵² *Pickaway Co. Bank v. Prather*, 12 Ohio St. 497.

²⁵³ *Lynchburg v. Norvell*, 20 Grat. 601.

²⁵⁴ *Goodman v. Simonds*, 20 How. 343; *Platt v. Jerome*, 2 Blatchf. 186, Fed. Cas. No. 11,217; *White v. How*, 3 McLean, 291, Fed. Cas. No. 17,549; *Slacom* (2638)

not show, as against such holder, that the instrument was obtained by fraudulent representations on the payee's part,²⁵⁵ or by duress;²⁵⁶ or that the maker was in his co-maker's employ, and signed the note because he was directed to do so by his employer.²⁵⁷ And,

v. Wishart, Id. 517, Fed. Cas. No. 12,933; *Clothier v. Adriance*, 51 N. Y. 322; *Chapman v. Rose*, 56 N. Y. 137; *Potter v. Belden*, 105 Mass. 11; *Smith v. Livingston*, 111 Mass. 342; *Thurston v. McKown*, 6 Mass. 428; *Perkins v. Challis*, 1 N. H. 254; *Phelan v. Moss*, 67 Pa. St. 59; *Gray v. Bank*, 29 Pa. St. 365; *Crampton v. Perkins*, 65 Md. 22, 3 Atl. 300; *Shipley v. Carroll*, 45 Ill. 285; *Smith v. Culton*, 5 Ill. App. 422; *Lay v. Wissman*, 36 Iowa, 305; *Burrill v. Parsons*, 71 Me. 282; *Roberts v. Lane*, 64 Me. 108; *Riley v. Schawacker*, 50 Ind. 592; *Kimble v. Christie*, 55 Ind. 140; *Corby v. Butler*, 55 Mo. 398; *Robenson v. Vason*, 37 Ga. 66; *Bush v. Peckard*, 3 Har. (Del.) 385; *Powers v. Ball*, 27 Vt. 662; *Paige v. Chapman*, 58 N. H. 333; *Barney v. Earle*, 13 Ala. 106; *Kinyon v. Wohlford*, 17 Minn. 239 (Gil. 215); *Davis v. Seeley*, 71 Mich. 209, 38 N. W. 901; *Williams v. Huntington*, 68 Md. 590, 13 Atl. 336; *Eames v. Crosier*, 101 Cal. 260, 35 Pac. 873; *McSparan v. Neeley*, 91 Pa. St. 17. So, too, a fraudulent misappropriation of the proceeds. *Garden City Nat. Bank v. Fidler*, 155 Pa. St. 210, 26 Atl. 372; *Clifton Forge v. Bank*, 92 Va. 283, 23 S. E. 284; *Arnau v. Bank*, 36 Fla. 398, 18 South. 786; *Germania Bank of New York v. La Follette*, 72 Fed. 145. As to relief of surety by fraud, see § 919, *supra*.

²⁵⁵ *McWilliams v. Mason*, 31 N. Y. 294, 6 Duer (N. Y.) 276; *Helst v. Hart*, 73 Pa. St. 286; *Loomis v. Metcalf*, 30 Iowa, 382; *Rowland v. Fowler*, 47 Conn. 347; *Humphrey v. Clark*, 27 Conn. 381; *Von Windisch v. Klaus*, 46 Conn. 333; *Third Nat. Bank v. McCann*, 15 Phila. 326; *Clark v. Tanner* (Ky.) 38 S. W. 11; *Lee v. Whitney*, 149 Mass. 447, 21 N. E. 948; *Bill v. Stewart*, 156 Mass. 508, 31 N. E. 386; *David v. Bank* (Ky.) 45 S. W. 878; *Wright v. Irwin*, 33 Mich. 32; *Wait v. Chandler*, 63 Me. 257; *Cannon v. Canfield*, 11 Neb. 506, 9 N. W. 693; *Doane v. King*, 30 Fed. 106; *Wildsmith v. Tracy*, 80 Ala. 259; *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 52 Pac. 995; *Ross v. Webster*, 63 Conn. 64, 26 Atl. 476; *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226; *Taylor v. Cribb*, 100 Ga. 94, 26 S. E. 468; *Zook v. Simonson*, 72 Ind. 85; *Woollen v. Whitacre*, 73 Ind. 198; *Ruddell v. Dillman*, Id. 518; *Converse v. Bartels* (Kan. Sup.) 46 Pac. 940; *Moore v. Moore*, 112 Ind. 149, 13 N. E. 673; *Taylor v. Thompson*, 3 Ill. App. 109. Although the maker was old and infirm. *Merritt v. Bagwell*, 70 Ga. 578. Or intoxicated. *McSparan v. Neeley*, 91 Pa. St. 17.

²⁵⁶ *Farmers' Bank of Grand Rapids v. Butler*, 48 Mich. 192, 12 N. W. 36; *Clark v. Pease*, 41 N. H. 414; *Hogan v. Moore*, 48 Ga. 156; *Veach v. Thompson*, 15 Iowa, 381; *O'Keefe v. Handy*, 31 La. Ann. 832. So, under a threat of prosecution for swindling. *Peckham v. Hendren*, 76 Ind. 47; *Herrick v. Swomley*, 56 Md. 439. But see § 690, *supra*.

²⁵⁷ *Fulford v. Block*, 8 Ill. App. 284.

even though the holder purchased the paper at a usurious discount, he will not be subject to the defense of fraud by the payee.²⁵⁸ But, where a purchaser receives notice of the fraud, he will be protected as a bona fide holder only to the extent of payments actually made by him before notice; and a mere agreement to pay the balance is not in this respect a payment.²⁵⁹ Fraud, in like manner, cannot be set up in defense against the bona fide holder of a bank note,²⁶⁰ or a coupon bond,²⁶¹ or a coupon detached from such bond.²⁶² And even the state indorsement of a railroad bond will not be discharged as to such holder by the fact that the bond was fraudulently misappropriated.²⁶³

Fraud—Between What Parties.

§ 1892. A bona fide holder is not affected by the fraud of one maker on his co-makers,²⁶⁴ or of a partner on his firm,²⁶⁵ or an officer on his corporation.²⁶⁶ So, the acceptor of a bill cannot set up against a bona fide holder that it was procured by the drawer's fraud.²⁶⁷ So, an indorser cannot set up that his indorsement was

²⁵⁸ *Richardson v. Brackett*, 101 Mass. 497.

²⁵⁹ *Dresser v. Construction Co.*, 93 U. S. 92; *Crandall v. Vickery*, 45 Barb. (N. Y.) 156.

²⁶⁰ *Solomons v. Bank*, 13 East, 135; *White v. How*, 3 McLean, 291, Fed. Cas. No. 17,549; *Robinson v. Bank*, 18 Ga. 65. And a bank cannot recover a payment made by it on a check, which it was induced to certify by fraud, even from one who received it for a precedent debt. *Justh v. Bank*, 56 N. Y. 478.

²⁶¹ *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513, 7 Atl. 318; *State v. Brown*, 64 Md. 199, 1 Atl. 54, and 6 Atl. 172.

²⁶² *Macon Co. v. Shores*, 97 U. S. 272.

²⁶³ *Gilman v. Railroad Co.*, 72 Ala. 566.

²⁶⁴ *Gridley v. Bane*, 57 Ill. 529; *Rothermal v. Hughes*, 134 Pa. St. 510, 19 Atl. 677.

²⁶⁵ *Rogers v. Batchelor*, 12 Pet. 221; *Henderson v. Anderson*, 3 How. 73; *Barber v. Van Horn*, 54 Kan. 33, 36 Pac. 1070; *Albietz v. Mellon*, 37 Pa. St. 367. And see § 424, *supra*.

²⁶⁶ *Grand Rapids & I. R. Co. v. Sanders*, 17 Hun (N. Y.) 552; *Wormer v. Agricultural Works*, 50 Iowa, 262; *Pittsburgh Ry. Co. v. Lynde* (Ohio Sup.) 44 N. E. 596; *Long Island Loan & Trust Co. v. Columbus, C. & I. C. Ry. Co.*, 65 Fed. 455.

²⁶⁷ *Iselin v. Bank*, 16 Misc. Rep. 437, 40 N. Y. Supp. 388. Although the plaintiff did not part with value on the strength of the acceptance. *Heurtematte v. Morris*, 28 Hun (N. Y.) 77, affirmed in 101 N. Y. 63, 4 N. E. 1.

fraudulently obtained by the maker.²⁶⁸ And the maker cannot set up that the payee fraudulently transferred collateral securities.²⁶⁹ So, fraud by a pledgee of the paper,²⁷⁰ or by one who holds it in trust,²⁷¹ cannot be set up against such holder; nor fraud in a transfer by one who holds the paper for some temporary and specific purpose.²⁷² So, the maker cannot set up that his collecting agent fraudulently transferred²⁷³ or diverted²⁷⁴ the paper; or that an agent, employed to obtain a discount for him, had fraudulently diverted it to his own use;²⁷⁵ or that it was made²⁷⁶ or indorsed²⁷⁷ in fraud of creditors; or that it had been left with the payee for a settlement which was never completed.²⁷⁸

²⁶⁸ *Blanchard v. Stevens*, 3 Cush. (Mass.) 162; *Kingsland v. Pryor*, 33 Ohio St. 19. Or a surety the false representation of his principal, *Riley v. Reifert* (Tex. Civ. App.) 32 S. W. 185; nor, conversely, a principal, the fraud of his surety inducing the new promise, *Fitzgerald v. Barker*, 196 Mo. 661, 10 S. W. 45.

²⁶⁹ *Kiel v. Reay*, 50 Cal. 61.

²⁷⁰ *Bancroft v. McKnight*, 11 Rich. Law (S. C.) 663.

²⁷¹ *Swift v. Smith*, 102 U. S. 445; *Bealle v. Bank*, 57 Ga. 274; *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567; *Reid v. Bank*, 70 Ala. 199; *Thompson v. Bank*, 113 N. Y. 325, 21 N. E. 57.

²⁷² *Stoner v. Brown*, 18 Ind. 464.

²⁷³ *Bank of New York v. Muskingum Branch of Bank of Ohio*, 29 N. Y. 619; *Culver v. Benedict*, 13 Gray (Mass.) 7; *Ogden v. Marchand*, 29 La. Ann. 61; *Bealle v. Bank*, 57 Ga. 274.

²⁷⁴ *Bank of New York v. Muskingum Branch of Bank of Ohio*, 29 N. Y. 619; *Lowndes v. Anderson*, 13 East, 130; *Pond v. Agricultural Works*, 50 Iowa, 596; *Davis v. Building Union*, 32 Md. 285; *Murrell v. Jones*, 40 Miss. 565; *Provost v. McEnroe*, 102 N. Y. 650, 5 N. E. 795; *Wyman v. Bank*, 5 Colo. 30. So, where a blank second part was negligently left with the agent, and fraudulently filled up and negotiated by him, after the first part had been used as intended. *Bank of Pittsburgh v. Neal*, 22 How. 96. But see, contra, where the bill was left with the indorser to collect, and was fraudulently surrendered by him in exchange for notes given to the payee of the bill for his individual debt. *Bank of Kansas City v. Mills*, 24 Kan. 604.

²⁷⁵ *Hanks v. Dunlap*, 10 Rich. Eq. (S. C.) 139; *Gwynn v. Lee*, 9 Gill (Md.) 137. Although the holder paid only part cash, and an overdue note for the balance. *Essex Co. Bank v. Russell*, 29 N. Y. 673.

²⁷⁶ *Murray v. Jones*, 50 Ga. 109.

²⁷⁷ *Hagan v. Sunwall*, 60 Minn. 367, 62 N. W. 398; *Armstrong v. Bank*, 41 Fed. 234.

²⁷⁸ *Todd v. Shelbourne*, 8 Hun (N. Y.) 510.

Fraud in Delivery.

§ 1893. If, on the other hand, the fraud affects the delivery of the instrument, so that it was never legally delivered by the defendant, it may be set up against a bona fide holder. This is so where it was fraudulently taken from the maker's table,²⁷⁹ or was stolen from him,²⁸⁰ before its delivery; or was torn by the payee from the maker's book, and from an attached stub containing express conditions.²⁸¹ So, state bonds fraudulently issued by a state treasurer after alteration;²⁸² or municipal bonds fraudulently reissued after redemption and cancellation,²⁸³ or state bonds stolen from the state treasurer after redemption, and fraudulently reissued.²⁸⁴

In Illinois the statute provides that "fraud or circumvention in making any written instrument" may be set up against any assignee.²⁸⁵ A similar statute in Wisconsin, allowing fraud to be set up against the bona fide holder of commercial paper, has been held to be unconstitutional as to existing obligations.²⁸⁶ In Minnesota, a party whose signature has been obtained without his negligence

²⁷⁹ *Burson v. Huntington*, 21 Mich. 415. But where the maker intended to add a condition, and the payee snatched the note away, it was held to be no defense at the suit of a bona fide holder, although the maker was prevented by sickness from prosecuting the payee. *Clarke v. Johnson*, 54 Ill. 296.

²⁸⁰ *Baxendale v. Bennett*, 3 Q. B. Div. 525; *Hall v. Wilson*, 16 Barb. (N. Y.) 548. Or after delivery in escrow only, *Andrews v. Thayer*, 30 Wis. 223; *Dodd v. Dunne*, 71 Wis. 582, 37 N. W. 430; and for another purpose, *Lenheim v. Willmarding*, 55 Pa. St. 73.

²⁸¹ *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382.

²⁸² *State v. Hart*, 46 La. Ann. 40, 14 South. 507; *Pugh v. Moore*, 44 La. Ann. 209, 10 South. 710; *Herwig v. Richardson*, 44 La. Ann. 703, 11 South. 135.

²⁸³ *District of Columbia v. Cornell*, 130 U. S. 655, 9 Sup. Ct. 694.

²⁸⁴ *Branch v. Commissioners*, 80 Va. 427.

²⁸⁵ ILLINOIS (Hurd's Rev. St. c. 98, § 10). In such case the bona fide holder and holders with notice are on the same footing. *Hewitt v. Jones*, 72 Ill. 218; *Hewitt v. Johnson*, Id. 513. But fraud in the consideration of a promissory note is not equivalent to fraud in obtaining it, and is not admissible against a bona fide holder. *Culver v. Bank*, 78 Ill. 625; *Easter v. Minard*, 26 Ill. 494; *Depuy v. Schuyler*, 45 Ill. 306; *Hayden v. Olinger*, 5 Ill. App. 632. So, in MICHIGAN, *First Nat. Bank of Sturgis v. Deal*, 55 Mich. 592, 22 N. W. 53.

²⁸⁶ *Cornell v. Hichens*, 11 Wis. 353.

by fraud, "so that he believed he was signing a different instrument," may set up such fraud against a bona fide purchaser of the paper.²⁸⁷

Where the defendant is guilty of negligence, and is induced by fraud to sign a bill or note, he cannot set up the defense against a bona fide holder.²⁸⁸ So, if he signed the paper supposing it to be an instrument of different character.²⁸⁹ So, a fortiori, where the instrument signed is afterwards altered, and turned into a bill or note, which could not have been discovered in the original instrument with ordinary diligence;²⁹⁰ or where one paper was read to the maker, and another fraudulently substituted for his signature, without negligence on his part.²⁹¹ So, where one personates another, and obtains a check payable to such person, and forges his indorsement, even a bona fide holder cannot recover upon the check.²⁹² On the other hand, the fact that a bill has been lost by or stolen from the rightful owner will not defeat a bona fide purchaser under genuine indorsements.²⁹³

²⁸⁷ MINNESOTA (Gen. St. § 2239). He must believe he is not signing a note at all. *Yellow Medicine Co. Bank v. Tagley*, 57 Minn. 391, 59 N. W. 486.

²⁸⁸ *Baldwin v. Barrows*, 86 Ind. 351; *Same v. Bricker*, Id. 221; *First Nat. Bank of Parkersburg v. Johns*, 22 W. Va. 520. And as to estoppel against defense by negligence, see § 1873, *supra*.

²⁸⁹ *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Whitney v. Snyder*, 2 Lans. (N. Y.) 477; *Anderson v. Walter*, 34 Mich. 113; *Briggs v. Ewart*, 51 Mo. 245; *Corby v. Weddle*, 57 Mo. 432; *Sims v. Bice*, 67 Ill. 88; *Hubbard v. Rankin*, 71 Ill. 129; *Munson v. Nichols*, 62 Ill. 111; *De Camp v. Hamma*, 29 Ohio St. 487; *First Nat. Bank of Omaha v. Lierman*, 5 Neb. 247; *Mitchell v. Tomlinson*, 91 Ind. 167; *Green v. Wilkie*, 98 Iowa, 74, 66 N. W. 1046; *First Nat. Bank of Sturgis v. Deal*, 55 Mich. 592, 22 N. W. 53; *Willard v. Nelson*, 35 Neb. 651, 53 N. W. 572; *Hutkoff v. Moje*, 20 Misc. Rep. 632, 46 N. Y. Supp. 905; *Bowers v. Thomas*, 62 Wis. 480, 22 N. W. 710; *National Exch. Bank of Auburn v. Beneman*, 43 Hun (N. Y.) 241; *Hill v. Thixton*, 94 Ky. 96, 23 S. W. 947; *Dinsmore v. Stimbert*, 12 Neb. 433, 11 N. W. 872; *Willard v. Nelson*, 35 Neb. 651, 53 N. W. 572. But such defense is admissible against a bona fide holder, where the maker is guilty of no negligence, and is induced by fraud to sign. And see § 1806, *supra*.

²⁹⁰ *Detwiler v. Bish*, 44 Ind. 70.

²⁹¹ *Butler v. Carns*, 37 Wis. 61.

²⁹² *Palm v. Watt*, 7 Hun (N. Y.) 317.

²⁹³ *Peacock v. Rhodes*, 2 Doug. 633; *Lawson v. Weston*, 4 Esp. 56; *Raphael v. Bank*, 17 C. B. 161; *Miller v. Race*, 1 Burrows. 452; *Murray v. Lardner*, 2 Wall. 110; *Seybel v. Bank*, 54 N. Y. 288; *Wheeler v. Guild*, 20 Pick. (Mass.) 545; *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667; *Same v. Lewis*, 12 N. J. Eq. 323; *Franklin Sav. Inst. v. Helmsman*, 1 Mo. App. 336; *Gren-*

Fraudulent Diversion—Accommodation Paper.

§ 1894. Where accommodation paper is negotiated, by the party accommodated, in violation of his agreement, it will be a defense for the accommodation party, except against a bona fide purchaser before maturity.²⁹⁴ But such diversion,²⁹⁵ or even a fraudulent diversion,²⁹⁶ of the paper, cannot be set up by an accommodation party against a bona fide purchaser. But a purchaser is only protected in such case to the extent of the amount paid by him.²⁹⁷ Thus, a pledgee of accommodation paper, which has been fraudulently diverted, is a bona fide holder, and protected as such, to the extent of the debt

eaux v. Wheeler, 6 Tex. 515; *Marsh v. Small*, 3 La. Ann. 402; *Consolidated Ass'n of Planters of Louisiana v. Avegno*, 28 La. Ann. 552. And this is true of a certified check payable in gold, and circulated as such, although purchased three years after it was issued. *Nolan v. Bank*, 67 Barb. (N. Y.) 24. And see § 327, *supra*.

²⁹⁴ *Bowman v. Van Kuren*, 29 Wis. 209. See § 1803, *supra*. It may be set up against the bank, which discounted the paper for the payee with knowledge of the agreement. *Garfield Nat. Bank v. Colwell*, 57 Hun, 169, 10 N. Y. Supp. 864.

²⁹⁵ *Brown v. Thompson*, 79 Tex. 58, 15 S. W. 168; *Gillespie v. Campbell*, 39 Fed. 724; *Peters v. Gay*, 9 Wash. 383, 37 Pac. 325; *Landsburg v. Sansone*, 18 Misc. Rep. 576, 42 N. Y. Supp. 470; by being discounted at another bank than that intended, *Frank v. Quast*, 80 Ky. 649, 6 S. W. 909; or by another than the payee named in it, *Evans v. Hardware Co. (Ark.)* 45 S. W. 370; or used to pay an antecedent debt, when intended to raise money for that purpose, *Tomblin v. Callen*, 69 Iowa, 229, 28 N. W. 573.

²⁹⁶ *Brooks v. Hey*, 23 Hun (N. Y.) 372; *Arnold v. Campbell*, 18 Cent. Law J. 289; *Merchants' Nat. Bank v. Comstock*, 55 N. Y. 24; *Bank of New York v. Vanderhorst*, 32 N. Y. 553; *Wareham Bank v. Lincoln*, 3 Allen (Mass.) 192; *Sweetser v. French*, 13 Metc. (Mass.) 262; *Moore v. Ward*, 1 Hilt. (N. Y.) 337; *Stoddard v. Kimball*, 6 Cush. (Mass.) 469; *Nutter v. Stover*, 48 Me. 163; *Winters v. Home Ins. Co.*, 30 Iowa, 172; *Quinn v. Hard*, 43 Vt. 375; *Farmers' & Mechanics' Bank v. Humphrey*, 36 Vt. 554; *Blair v. Hagemeyer*, 26 App. Div. 219, 49 N. Y. Supp. 965; *Hyman v. Forge Co.*, 18 Misc. Rep. 381, 41 N. Y. Supp. 655; *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. 864; *Bunzel v. Maas*, 116 Ala. 68, 22 South. 568; *Witte v. Williams*, 8 S. C. 230; *Hutchinson v. Mitchell*, 15 La. Ann. 326; *Brush v. Scribner*, 11 Conn. 388. So, a repledge of an accommodation note after release of collateral and virtual payment of the original debt secured. *Miller v. Larned*, 103 Ill. 570. And see, as to fraudulent diversion, 27 Lawy. Rep. Ann. 519, note.

²⁹⁷ *Brown v. Mott*, 7 Johns. (N. Y.) 361.

secured,²⁹⁸ and no further.²⁹⁹ Where the defense would not be admissible against the indorsee, he will not be precluded by a prior judgment rendered against him in favor of an intermediate indorser.³⁰⁰ And in New York it has been held that such defense may be set up against one who takes the note in payment of an existing debt;³⁰¹ and that the accommodation indorser may be protected against such holder by a bill in equity.³⁰²

Release, Satisfaction, and Set-Off.

§ 1895. If the drawer of a bill releases the acceptor before the bill is issued, the acceptor cannot set up the release against a bona fide purchaser for value before maturity.³⁰³ So, the drawer cannot set up that he has received satisfaction from the acceptor, and surrendered the bill to him before its transfer to the plaintiff.³⁰⁴ So, an agreement between the original parties for a particular satisfaction of the bill is not admissible;³⁰⁵ nor a release by one who fraudulently pretended to hold all the notes secured by a trust deed, and indorsed a satisfaction on the deed;³⁰⁶ nor a release of the payee, the accommodation maker claiming a discharge under it.³⁰⁷ And the payee of a negotiable note has no authority to satisfy it after its transfer to a bona fide purchaser, and such satisfaction will be canceled in equity.³⁰⁸ So, an agreement for a compromise between maker and payee will not be binding upon such purchaser.³⁰⁹

²⁹⁸ *Chicopee Bank v. Chapin*, 8 Metc. (Mass.) 40.

²⁹⁹ *Stoddard v. Kimball*, 6 Cush. (Mass.) 469.

³⁰⁰ *National Bank of Republic v. Brooklyn City & N. R. Co.*, 14 Blatchf. 242, Fed. Cas. No. 10,039.

³⁰¹ *Moore v. Ryder*, 65 N. Y. 438; *Prentiss v. Graves*, 33 Barb. 621.

³⁰² *Comstock v. Hier*, 73 N. Y. 269.

³⁰³ *Byles, Bills*, 242; *Chit. Bills*, 351; *Benj. Chalm. Dig. art. 239*; *Dod v. Edwards*, 2 Car. & P. 602. Although he purchased at discount, and without diligence. *Schoen v. Houghton*, 50 Cal. 528. And where a note is payable to A. or bearer, the maker cannot set up a release by the husband of A. against a bona fide holder, *McCann v. Lewis*, 9 Cal. 246.

³⁰⁴ *Morley v. Culverwell*, 7 Mees. & W. 174.

³⁰⁵ *Edwards v. Jones*, 2 Mees. & W. 414, 7 Car. & P. 633; 5 Dowl. 585.

³⁰⁶ *Gottschalk v. Neal*, 6 Mo. App. 596.

³⁰⁷ *Union Bank v. Crine*, 33 Fed. 811.

³⁰⁸ *Gordon v. Mulhare*, 13 Wis. 22.

³⁰⁹ *Gutwillig v. Stumes*, 47 Wis. 428, 2 N. W. 774. E. g. by agreement to
(2645)

In like manner the acceptor of a bill cannot set off against a bona fide holder a debt due from the drawer,³¹⁰ nor the maker a debt due from the payee.³¹¹ But in Massachusetts the maker may set off a debt due from the payee of a demand note.³¹² And by the statute in New Jersey set-offs were formerly allowed, unless the note contained the words "without defalcation or discount."³¹³ In Massachusetts a note payable to A. or bearer at a time certain is not subject to set-off against A. in a suit brought by a subsequent holder as bearer.³¹⁴ So, where the payee of a note sues on it for the use of a subsequent bona fide purchaser, the maker cannot avail himself of a set-off existing against intermediate parties.³¹⁵ And if an accommodation indorser pays a note to a bona fide purchaser, he may recover against the maker, although the maker had a set-off against the payee, which was known to the indorser at the time he indorsed, but was not available against such bona fide holder.³¹⁶

In like manner, payment made to the payee or any prior holder without surrender of the bill constitutes no defense against a bona fide holder;³¹⁷ especially if made after transfer by the party re-

set off the debt of the payee to the maker and A. as executors. *Cripps v. Davis*, 12 Mees. & W. 159.

³¹⁰ *In re Agra & Masterman's Bank*, 2 Ch. App. 391. Nor conversely, *Bank of Martin v. Cassidy* (Ky.) 45 S. W. 110; *Manning v. Maroney*, 87 Ala. 563, 6 South. 343.

³¹¹ *Price v. Keen*, 40 N. J. Law, 332; *Tillou v. Britton*, 9 N. J. Law, 120; *Farmers' Bank of Saratoga Co. v. Maxwell*, 32 N. Y. 579; *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104; *Tredwell v. Blount*, 86 N. C. 33; *Bostick v. Scruggs*, 50 Ala. 10; *Pavey v. Stauffer*, 45 La. Ann. 353, 12 South. 512; *Leavitt v. Peabody*, 62 N. H. 185; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10; *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775. Especially where it arises out of other transactions. *Cumberland Bank v. Hann*, 18 N. J. Law, 222. And under the Alabama statute usurious interest paid in advance for an extension cannot be set off against a bank which took the note as collateral for a precedent debt without notice. *Oates v. Bank*, 100 U. S. 239.

³¹² *Lewis v. Brooks*, 9 Metc. 367. But this statute does not apply to a certificate of deposit issued by a bank. *Shute v. Bank*, 136 Mass. 487.

³¹³ *Youngs v. Little*, 15 N. J. Law, 1.

³¹⁴ *Pettee v. Prout*, 3 Gray, 502.

³¹⁵ *Sykes v. Lewis*, 17 Ala. 261.

³¹⁶ *Barker v. Parker*, 10 Gray (Mass.) 339.

³¹⁷ *Bank of University v. Tuck*, 96 Ga. 456, 23 S. E. 467; *Hecksher v. Shoe* (2646)

ceiving payment,³¹⁸ and after maturity of the paper.³¹⁹ So, too, an involuntary payment made to the payee by his sale of collateral held by him.³²⁰

maker, 47 Pa. St. 249; *Flower v. Noble*, 38 La. Ann. 938; *Trustees of Internal Imp. Fund v. Lewis*, 34 Fla. 424, 16 South. 325. And see § 1415, *supra*.

³¹⁸ *First Nat. Bank of Salisbury v. Michael*, 96 N. C. 53, 1 S. E. 855; *Williams v. Keyes*, 90 Mich. 290, 51 N. W. 520. And see § 1462 *et seq.*, *supra*.

³¹⁹ *Capital City Ins. Co. v. Quinn*, 73 Ala. 558.

³²⁰ *Glasscock v. Balls*, 24 Q. B. Div. 13.

III. PAROL EVIDENCE.

- § 1896. Admissibility—General Principles.
- 1897. — Ambiguity Explained.
- 1898. — Maturity Extended.
- 1899. — Satisfaction and Payment.
- 1900. — Release.
- 1901. — Varying Liability of Maker.
- 1902. — Varying Liability of Surety.
- 1903. — Varying Liability of Indorser.
- 1904. Contemporary Writings.

Admissibility of Parol Evidence.

§ 1896. The acceptor of a bill of exchange or other party to it is only bound by the terms of his agreement.³²¹ And parol evidence is inadmissible to vary such agreement by showing a contemporaneous verbal agreement of a different character,³²² or conversations had at the time or before.³²³ Such evidence is, however, admissible to prove the circumstances under which the paper was executed;³²⁴ e. g. to show the coverture of the maker (which was not disclosed in the note);³²⁵ or to show that the note was given to take up another note;³²⁶ or to show when a written memorandum on the note was made;³²⁷ or that the execution of the note was obtained by threat of criminal prosecution against one of the maker's family,³²⁸ or by fraudulent representations.³²⁹ It is evident, indeed, that fraud, il-

³²¹ *Everard v. Warner*, 36 Minn. 383, 31 N. W. 353.

³²² *Foglesong v. Wickard*, 75 Ind. 258; *Ewing v. Clark*, 76 Mo. 545. This protection against varying by parol extends to a printed memorandum on the back of the note. *Seymour v. Farquhar*, 93 Ala. 292, 8 South. 466.

³²³ Before, *Herndon v. Henderson*, 41 Miss. 584; or contemporaneous, *Burlingame v. Foster*, 128 Mass. 125.

³²⁴ *Fisk v. Reser*, 19 Colo. 88, 34 Pac. 572 (indorsement by a stranger to the note).

³²⁵ *Mount v. Zisken*, 7 N. J. Law J. 71. So, to explain the circumstances of issuing a nonnegotiable note. *Smith v. Van Blarcom*, 45 Mich. 371, 8 N. W. 90.

³²⁶ *Duncan v. Gilbert*, 29 N. J. Law, 521.

³²⁷ *Heywood v. Perrin*, 10 Pick. (Mass.) 228.

³²⁸ *Snyder v. Willey*, 33 Mich. 483.

³²⁹ *Hines v. Driver*, 72 Ind. 125.

legality, and alteration or forgery can, in general, be established only by parol evidence.

The real consideration may be shown by parol, where it is admissible as a defense; e. g. that it was for forbearance or extension given,³³⁰ or for accommodation;³³¹ or that there was no consideration,³³² or that it was illegal,³³³ or had failed;³³⁴ or that a note was given as a payment to be credited on the maker's account,³³⁵ or as collateral for an existing debt;³³⁶ or was not to be construed as a relinquishment or waiver of a set-off claimed against such debt.³³⁷

So, parol evidence is admissible to show that a note was delivered conditionally.³³⁸ But it is not admissible to render the contract itself conditional;³³⁹ e. g. that a note was not to be transferred,³⁴⁰ or was to be used for a particular purpose only,³⁴¹ or was to be released if the maker became insolvent,³⁴² or was to be first allowed judicially against the estate of the maker's testator;³⁴³ or that a draft was to take effect as an assignment of the fund in the drawee's hands.³⁴⁴

³³⁰ *Kelly v. Theiss*, 21 Misc. Rep. 311, 47 N. Y. Supp. 145. And see § 565, as to parol evidence of consideration.

³³¹ *Breitengross v. Farr* (Wis.) 75 N. W. 893; *Moynihan v. McKeon*, 16 Misc. Rep. 343, 38 N. Y. Supp. 61; *Goldsmith v. Holmes*, 36 Fed. 484.

³³² *Kulenkamp v. Groff*, 71 Mich. 675, 40 N. W. 57.

³³³ *Groesbeck v. Marshall*, 44 S. C. 538, 22 S. E. 743.

³³⁴ *Brady v. Henry*, 71 Cal. 481, 11 Pac. 385, and 12 Pac. 623; *Brown v. Summers*, 91 Ind. 151.

³³⁵ *Bennett v. Tillmon*, 18 Mont. 28, 44 Pac. 80. And see § 1899, *infra*.

³³⁶ *Keeler v. Printing Co.*, 16 Wash. 526, 48 Pac. 239.

³³⁷ *Bohn Mfg. Co. v. Harrison*, 13 Mont. 293, 34 Pac. 313.

³³⁸ See §§ 227, 231, *supra*.

³³⁹ See § 94, *supra*. So, *Hunt v. Johnson*, 96 Ala. 130, 11 South. 387; *Beecher v. Dunlap*, 52 Ohio St. 64, 38 N. E. 795.

³⁴⁰ *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321.

³⁴¹ *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. 837.

³⁴² *Harrison v. Morrison*, 39 Minn. 319, 40 N. W. 66.

³⁴³ *McGrath v. Barnes*, 13 S. C. 328.

³⁴⁴ *Baer v. English*, 84 Ga. 403, 11 S. E. 453.

Ambiguity Explained.

§ 1897. Parol evidence is admissible to explain an ambiguity apparent on the face of the paper;³⁴⁵ especially where there is a disagreement between the note and a contemporaneous collateral mortgage for the same debt.³⁴⁶ So, parol evidence is admissible to show that a note, imperfectly described in a collateral mortgage, is the one referred to;³⁴⁷ or to identify the wife of one who signs a note as "A. B., Agent for Wife";³⁴⁸ or to explain abbreviations used in a note;³⁴⁹ or to identify the payee of a duebill, which names none;³⁵⁰ or to show the date of a note, which is badly written and illegible;³⁵¹ or to explain the word "duplicate" in a note;³⁵² or that the person countersigning a bank bill was the cashier (as required by law);³⁵³ or that the place of payment designated as "my office" was in H.;³⁵⁴ or that A. was the payee intended in a note by A. and B. to the "order of myself";³⁵⁵ or that "without recourse" between two indorsements belonged to the last one;³⁵⁶ or to explain the words, "Charge the amount against me and my share of my moth-

³⁴⁵ Lockhard v. Avery, 8 Ala. 502; Kelly v. Bronson, 26 Minn. 359, 4 N. W. 607.

³⁴⁶ Payson v. Lamson, 134 Mass. 593.

³⁴⁷ Aull v. Lee, 61 Mo. 160; Stowe v. Merrill, 77 Me. 550, 1 Atl. 684. So, in a receipt and agreement to extend "certain notes we hold." Bell v. Martin, 18 N. J. Law, 167.

³⁴⁸ Rawlings v. Robson, 70 Ga. 595; or to show an undisclosed principal, where the note was signed "A. B., Agent." Dessau v. Bours, 1 McAll. 21, Fed. Cas. No. 3,825; or to charge an agent individually, although he accepted a bill as "agent of B.," Hardy v. Pilcher, 57 Miss. 18. And see § 131 et seq., supra.

³⁴⁹ First Nat. Bank of Springfield v. Fricke, 75 Mo. 178.

³⁵⁰ Nicholas v. Krebs, 11 Ala. 230; or of a sealed note, Barkley v. Tarrant, 20 S. C. 574.

³⁵¹ Fenderson v. Owen, 54 Me. 372. As to correction of dates where there is no estoppel, see Paige v. Carter, 64 Cal. 489, 2 Pac. 260; Barlow v. Buckingham, 68 Iowa, 169, 26 N. W. 58; Burns v. Moore, 76 Ala. 339. And see § 77, supra.

³⁵² McCann v. Preston, 79 Md. 223, 28 Atl. 1102.

³⁵³ Bank of Utica v. Magher, 18 Johns. (N. Y.) 341.

³⁵⁴ Rudolph v. Brewer, 96 Ala. 189, 11 South. 314.

³⁵⁵ Jenkins v. Bass, 88 Ky. 397, 11 S. W. 293.

³⁵⁶ Corbett v. Fitzer, 47 Neb. 209, 66 N. W. 417.

er's estate,"³⁵⁷ or "what moneys may be due me,"³⁵⁸ or "to be paid out of the last payment";³⁵⁹ but not to explain that "legally due" was intended for "equitably due."³⁶⁰

A frequent ambiguity is found in the manner of execution by an agent or by the officer of a corporation. The availability of parol evidence to explain such signatures has been already discussed.³⁶¹ In addition to the cases there cited, the following may be referred to as holding such evidence inadmissible to charge the alleged agent individually,³⁶² or to discharge him.³⁶³ On the other hand, parol evidence has been admitted to discharge the agent from individual liability,³⁶⁴ and to charge the principal.³⁶⁵

Maturity Extended by Parol Evidence.

§ 1898. Parol evidence is not admissible to show a contemporaneous verbal agreement extending or changing the time of maturity

³⁵⁷ *Schmittler v. Simon*, 114 N. Y. 176, 21 N. E. 162.

³⁵⁸ *Capron v. Anness*, 136 Mass. 271.

³⁵⁹ *Proctor v. Hartigan*, 143 Mass. 462, 9 N. E. 841.

³⁶⁰ *McDuffie v. Magoon*, 26 Vt. 518.

³⁶¹ See § 147, *supra*.

³⁶² *Falk v. Moebes*, 127 U. S. 597, 8 Sup. Ct. 1319 (note signed "P. C. Co., A. B., Sec. & Treas.," to the order of "A. B., Sec. & Treas.," and so indorsed).

³⁶³ *Matthews v. Mattress Co.*, 87 Iowa, 246, 54 N. W. 225 (note, "We promise," etc., signed "D. M. Co., J. K., Pres.>").

³⁶⁴ "We promise," etc., "A. B., Pres. C. D., Secy." *Brunswick-Balke-Clender Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261; "We promise," etc. "A. B., Pres. Chicago R. R. Co. C. D., Secy.," and corporation seal. *Scanlan v. Keith*, 102 Ill. 634. "The W. S. Soc. agrees," etc. "A. B., Gen. Supt." *Frankland v. Johnson*, 147 Ill. 520, 35 N. E. 480. "I promise," etc., "A. B., Pres. O. F. Assoc. C. D., Secy." *Benham v. Smith*, 53 Kan. 495, 36 Pac. 997 (with help of recitals in collateral mortgage). "We, the trustees of the M. Grange, promise," etc. "A. B., C. D." *Simanton v. Vilet* (N. J. Err. & App.) 40 Atl. 505.

³⁶⁵ Note signed "A. B., Agent," *Sykes v. Temple*, 69 Hun, 448, 23 N. Y. S. 425; or "A. B., Trustee." *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293, 48 N. W. 1116; or by several designated as "president" and "directors" below name of the corporation. *Kline v. Bank*, 50 Kan. 91, 31 Pac. 688; or indorsed "A. B., C. D., as Directors of the K. K. Co.," *Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co.*, 5 Okl. 32, 47 Pac. 484.

expressed in the paper;³⁶⁶ or to show an agreement at the time of making a note that it should be renewed at maturity,³⁶⁷ or paid only on the happening of some contingent event;³⁶⁸ or to fix a time deferring payment where no time was expressed,³⁶⁹ or where it was payable "in 6 months, if desired, with interest";³⁷⁰ or that a note payable one day after date was to be paid at a later day.³⁷¹ So, it cannot be shown by parol that the note was to remain in the payee's hands, to be paid out of certain moneys which he expected to receive for the maker.³⁷² And parol evidence is not admissible to contradict a memorandum made after the note was signed, but before its delivery, and forming part of the original contract.³⁷³ So,

³⁶⁶ *Hoare v. Graham*, 3 Camp. 57; *Porteous v. Muir*, 8 Ont. 127; *Bradbury v. Oliver*, 5 U. C. Q. B. (O. S.) 703; *Cairo & V. R. Co. v. Parker*, 84 Ill. 613; *Litchfield v. Falconer*, 2 Ala. 280; *Doss v. Peterson*, 82 Ala. 253, 2 South. 644. E. g. that a note payable at a certain time was to be paid "when the cotton crop should come in," *Diercks v. Roberts*, 13 S. C. 338; or when certain work was finished, *Heaverin v. Donnell*, 7 Smedes & M. (Miss.) 244; or not until the maker's other liability as surety for the payee was discharged, *Frost v. Everett*, 5 Cow. (N. Y.) 497; or until certain moneys were received, *Joyner v. Turner*, 19 Ark. 690; *Kincaid v. Higgins*, 1 Bibb (Ky.) 396; or certain goods sold, *Harlow v. Boswell*, 15 Ill. 56; or until the money could be made out of certain property, *Ockington v. Law*, 66 Me. 551; *Campbell v. Upshaw*, 7 Humph. (Tenn.) 185. And see § 120, *supra*.

³⁶⁷ *Stiles v. Vandewater*, 48 N. J. Law, 67, 4 Atl. 658; *Anspach v. Bast*, 52 Pa. St. 356; *Wallace v. Richards*, 16 Utah, 52, 50 Pac. 804; *Dorsey v. Armor* (Colo. App.) 50 Pac. 726; until it was convenient to pay, *Kennedy v. Gaddie* (Ky.) 32 S. W. 408; or to renew and not to negotiate, *Helst v. Hart*, 73 Pa. St. 286.

³⁶⁸ *Wooley v. Cobb*, 165 Mass. 503, 43 N. E. 497; *Beecher v. Dunlap*, 52 Ohio St. 64, 38 N. E. 795; *Van Etten v. Howell*, 40 Neb. 850, 59 N. W. 389; *Slusher v. Conant* (Ky.) 37 S. W. 579.

³⁶⁹ Only after demand, *Nicholas v. Krebs*, 11 Ala. 230; or on the maker's arrival at A., *Thompson v. Ketchum*, 8 Johns. (N. Y.) 190. But see, *contra*, *Horner v. Horner*, 145 Pa. St. 258, 23 Atl. 441; *Gray v. Anderson*, 99 Iowa, 342, 68 N. W. 790.

³⁷⁰ *Citizens' Bank of Los Angeles v. Jones* (Cal.) 53 Pac. 354.

³⁷¹ *Willse v. Whitaker*, 22 Hun (N. Y.) 242; *Cooper v. Tappan*, 4 Wis. 362; *Gibson v. Irby*, 17 Tex. 173; *Coughenour v. Suhre*, 71 Pa. St. 462.

³⁷² *Currier v. Hale*, 8 Allen (Mass.) 47; and in installments, *Walker v. Russell*, 17 Pick. (Mass.) 280.

³⁷³ E. g. to show that plaintiff said he would not agree to the memorandum (for payment in installments), *Heywood v. Perrin*, 10 Pick. (Mass.) 228.

the maker of a note cannot show that the payee agreed, at the time of making, not to bring suit for a year.³⁷⁴ But where a note is payable one year from the death of A., with interest at 6 per cent., it may be shown that the maker agreed to pay the interest annually.³⁷⁵

Parol Evidence of Satisfaction.

§ 1899. In like manner, a contemporaneous parol agreement cannot be shown that the note should be satisfied in bills for freight,³⁷⁶ or should be surrendered on receipt of a certain deed³⁷⁷ or of another note;³⁷⁸ or to show that certificates described in the note as collateral were to be received at its maturity in absolute payment;³⁷⁹ or that a mortgage transferred to the holder after maturity of the note was taken as collateral only;³⁸⁰ or that mortgaged premises conveyed to the holder to sell and apply were received in absolute payment;³⁸¹ or might be paid in Confederate currency,³⁸² or by a bond,³⁸³ or in work,³⁸⁴ or out of a particular fund,³⁸⁵ or primarily

³⁷⁴ *Schroer v. Wessell*, 89 Ill. 113; *Dow v. Tuttle*, 4 Mass. 414; or until an account should be settled and applied on it, *Mahan v. Sherman*, 7 Blackf. (Ind.) 378; or until as much as possible should be obtained from the principal, *Campbell v. Hodgson*, Gow, 74; or so long as the interest should be paid, *Church & Congregation in Second Precinct in Pembroke v. Stetson*, 5 Pick. (Mass.) 506.

³⁷⁵ *Dance v. Dance*, 56 Md. 433. So that a note from husband to wife, payable one day after date, was to bear interest or not. *Beaver v. Secor*, 182 Pa. St. 213, 37 Atl. 991.

³⁷⁶ *Edwards v. Jones*, 2 Mees. & W. 414; or in other accounts, *Bender v. Montgomery*, 8 Lea (Tenn.) 586.

³⁷⁷ *Spring v. Lovett*, 11 Pick. (Mass.) 417.

³⁷⁸ Or a note with security. *Gardner v. Matthews*, 11 Mo. App. 269. Even, it has been held, with proof of tender, *Hill v. Gaw*, 4 Pa. St. 493; or of delivery, *Burge v. Dishman*, 5 Blackf. (Ind.) 272.

³⁷⁹ *Perry v. Bigelow*, 128 Mass. 129.

³⁸⁰ *Parker v. McCrea*, 7 U. C. C. P. 124.

³⁸¹ *Leonard v. Smith*, 11 Metc. (Mass.) 330.

³⁸² *Leslie v. Langham's Ex'rs*, 40 Ala. 525. And see § 103, *supra*, as to parol evidence relative to waiver of payment.

³⁸³ *La Fayette Co. Monument Corp. v. Magoon*, 73 Wis. 627, 42 N. W. 17.

³⁸⁴ *Stein v. Fogarty* (Idaho) 43 Pac. 681.

³⁸⁵ *Mumford v. Tolman*, 157 Ill. 258, 41 N. E. 617; *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283; *Gorrell v. Insurance Co.*, 11 C. C. A. 240, 63 Fed. 371.

out of such fund,³⁸⁶ or in cotton out of the first picking;³⁸⁷ or with certain rebates, not expressed,³⁸⁸ or for a reduced amount in a certain contingency;³⁸⁹ or to render an express agreement for absolute payment conditional.³⁹⁰

So, the maker cannot show that the note was given for advances from the maker's father on an agreement at the time that it should be settled in the distribution of his estate.³⁹¹ Parol evidence is likewise inadmissible to show a contemporaneous agreement that an existing account or debt should be used as a set-off against it.³⁹²

But parol evidence is admissible to show whether a note is given in satisfaction of the debt or as a mere security;³⁹³ or to show that a judgment was confessed by the maker at suit of an indorser for collateral security, and not as a satisfaction;³⁹⁴ or to show a contemporaneous agreement with the indorser (the plaintiff) that the note should be charged to the maker on a contract in course of performance between him and the indorsee.³⁹⁵ So, a contemporaneous

³⁸⁶ *Moore v. Prussing*, 165 Ill. 319, 46 N. E. 184. But see, contra, as a condition of delivery, *Western Nat. Bank v. Wood*, 64 Hun, 635, 19 N. Y. Supp. 81; *McCullum v. Boughton*, 132 Mo. 601, 33 S. W. 476.

³⁸⁷ *James v. Benjamin*, 72 Ga. 185.

³⁸⁸ *Phelps v. Abbott* (Mich.) 72 N. W. 3; *Moody v. Shaw*, 85 Ind. 88. But see § 1900, *infra*. See, too, § 106, *supra*, as to evidence to vary amount.

³⁸⁹ *Wells v. Carr*, 25 Fed. 541.

³⁹⁰ *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408; or, conversely, *Kervan v. Townsend*, 25 App. Div. 256, 49 N. Y. Supp. 137; *Kelsey v. Chamberlain*, 47 Mich. 241, 10 N. W. 355. But see *Maltz v. Fletcher*, 52 Mich. 484, 18 N. W. 228, where the condition and breach constituted a failure of consideration as to the payee.

³⁹¹ *Porter v. Porter*, 51 Me. 376. But see, contra, as evidence of want of consideration, *Bragg v. Stanford*, 82 Ind. 234; *Buscher v. Knapp*, 107 Ind. 340, 8 N. E. 263; although the check was given in settlement of an account rendered, *Park v. Miller*, 27 N. J. Law, 338.

³⁹² *Clark v. Hart*, 49 Ala. 86; *Eaves v. Henderson*, 17 Wend. (N. Y.) 190; *St. Louis Perpetual Ins. Co. v. Homer*, 9 Metc. (Mass.) 39; *Featherston v. Wilson*, 4 Ark. 154.

³⁹³ *Hale v. Rice*, 124 Mass. 292; *First Nat. Bank of Newcastle v. Nugen*, 99 Ind. 160; *Weston v. Wiley*, 78 Ind. 54; *Farnham v. Ingham*, 5 Vt. 514. But see, contra, *Moore v. Prussing*, 165 Ill. 319, 46 N. E. 184.

³⁹⁴ *Bank of South Carolina v. Myers*, 1 Bailey (S. C.) 412.

³⁹⁵ *Susquehanna Bridge & Bank Co. v. Evans*, 4 Wash. C. C. 480, Fed. Cas. No. 13,633.

agreement to pay a note in timber, followed by such payment, may be proved by parol;³⁹⁶ or to pay out of a particular fund, which was so applied.³⁹⁷ And it may be shown that the note was given as collateral security for the performance of a trust, which had been fully discharged;³⁹⁸ or that two notes secured by one collateral mortgage should, by the payee's agreement with his indorsee at the time of transfer, share the collateral security pro rata.³⁹⁹ And the maker of a note may prove a subsequent agreement with the payee for crediting on it services rendered by the maker.⁴⁰⁰

Parol Evidence of Release.

§ 1900. Parol evidence is admissible to show a release by the plaintiff;⁴⁰¹ or, as against a holder with notice, to show a contemporaneous agreement to allow a rebate for shortage in the goods for which the note was given;⁴⁰² or to show a contemporaneous verbal agreement for a release on the surrender of the property for which the note was given, followed by the surrender of the property.⁴⁰³ So, it may be shown by parol that a note, due at a given

³⁹⁶ *Buchanon v. Adams*, 49 N. J. Law, 636, 10 Atl. 662; *Zimmerman v. Adee*, 126 Ind. 15, 25 N. E. 828.

³⁹⁷ *Des Moines Co. v. Hinkley*, 62 Iowa, 637, 17 N. W. 915; *Andrews v. Hess*, 20 App. Div. 194, 46 N. Y. Supp. 796.

³⁹⁸ *Leighton v. Bowen*, 75 Me. 504.

³⁹⁹ *Crowder v. Dunbar*, 74 Ga. 109.

⁴⁰⁰ *Rugland v. Thompson*, 48 Minn. 539, 51 N. W. 604.

⁴⁰¹ *Daggett v. Whiting*, 35 Conn. 366; *Schultz v. Noble*, 77 Cal. 79, 19 Pac. 182; or a verbal agreement subsequent to the making of the note, *Rigsbee v. Bowler*, 17 Ind. 167; *De Goey v. Van Wyk*, 97 Iowa, 491, 66 N. W. 787; or to show a waiver of protest by the guarantor of a note without release of a prior indorser, *Zahm v. Bank*, 103 Pa. St. 576; or a change in the place of payment, *Robinson v. Batchelder*, 4 N. H. 40. But a subsequent agreement, without new consideration, to reduce the rate of interest reserved, is inadmissible. *Davis v. Stout*, 126 Ind. 12, 25 N. E. 862.

⁴⁰² *Brady v. Henry*, 71 Cal. 481, 12 Pac. 623; on ascertaining the amount, *Williams v. Culver*, 30 Or. 375, 48 Pac. 365; or on a contemplated change in the consideration, *Middleton v. Griffith*, 57 N. J. Law, 442, 31 Atl. 405; *Michigan Mut. Life Ins. Co. v. Williams*, 155 Pa. St. 405, 26 Atl. 655.

⁴⁰³ Especially as against a holder without consideration. *Van Valkenburgh v. Stupplebeen*, 49 Barb. (N. Y.) 99. So, an agreement to pay a certain amount in two years if the note was released, coupled with a formal release of the note. *Clarke v. Tappin*, 32 Conn. 56.

time, was not to bear interest after maturity;⁴⁰⁴ or that a verbal agreement was made at the time of giving a corporation note that the stockholders should not be personally liable for the debt.⁴⁰⁵ So, in Indiana, where the assignor's liability is conditioned on diligent prosecution of the maker, it may be shown by parol that it was agreed that the assignee should not sue the maker until requested by the assignor, and that the assignor should remain liable without such suit.⁴⁰⁶

On the other hand, parol evidence is inadmissible to show a contemporaneous verbal agreement to release the maker and surrender the note,⁴⁰⁷ or to look to the acceptor of a bill and discharge the drawer,⁴⁰⁸ or not to hold one maker if the plaintiff could recover against the other parties.⁴⁰⁹ But, where a verbal contemporaneous agreement is once admitted without objection, it has been held to be part of the note, and not open to further question.⁴¹⁰

Parol Evidence to Vary Maker's Liability.

§ 1901. Parol evidence is inadmissible to show that it was agreed at the time of making a note that the maker should not be called on for payment,⁴¹¹ or that the payee should take care of the note

⁴⁰⁴ *Elliott v. Elliott's Adm'r*, 79 Ky. 277.

⁴⁰⁵ After judgment rendered on the note. *Brown v. Slate Co.*, 134 Mass. 590.

⁴⁰⁶ *Schmied v. Frank*, 86 Ind. 250. But the contrary is provided by statute in TEXAS (Rev. St. art. 310).

⁴⁰⁷ *Davy v. Kelley*, 66 Wis. 452, 29 N. W. 232; *Warren Academy Trustees v. Starrett*, 25 Me. 443.

⁴⁰⁸ *Hancock v. Fairfield*, 30 Me. 299.

⁴⁰⁹ *Foster v. Jolly*, 1 Crompt. M. & R. 703; *Tower v. Richardson*, 6 Allen (Mass.) 351; *McEwan v. Ortman*, 34 Mich. 325.

⁴¹⁰ *Hathaway v. Hagan*, 59 Vt. 75, 8 Atl. 678.

⁴¹¹ *First Nat. Bank of Whitehall v. Tisdale*, 18 Hun, 151, 84 N. Y. 655; *Remington v. Wright*, 43 N. J. Law, 451, affirming 41 N. J. Law, 48; *Commercial Nat. Bank v. Henninger*, 105 Pa. St. 496; *Rodgers v. Donovan*, 13 Phila. 51; *San José Sav. Bank v. Stone*, 59 Cal. 183; *Jenkins v. Skinn*, 55 Ark. 347, 18 S. W. 240; *Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496; *Kulenkamp v. Groff*, 71 Mich. 675, 40 N. W. 57; *Lebanon Sav. Bank v. Penney*, 44 Minn. 214, 46 N. W. 331; *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321; *First Nat. Bank of Nephi v. Foote*, 12 Utah, 157, 42 Pac. 205; *Miller v. McNair*, 65 Wis. 452, 27 N. W. 333; *Moore v. Beem*, 83 Ind. 219; or should only be liable on certain conditions, *Trentman v. Fletcher*, 100 Ind. 105; *Montgomery R. Co.*

at its maturity.⁴¹³ And a parol agreement cannot be proved between the maker and indorser, altering in any way the maker's liability;⁴¹³ e. g. to the effect that the payee should foreclose a collateral mortgage, and not hold the maker,⁴¹⁴ or that the maker should not be liable unless the note was signed by another party,⁴¹⁵ or that the intention of a note executed by a married woman was to charge her separate estate.⁴¹⁶ So, that the drawer of a bill should not be liable,⁴¹⁷ or that the bill should be received after its acceptance as a full discharge of the drawer's debt.⁴¹⁸ So, it cannot be shown by parol that the payee promised not to call on the acceptor for payment,⁴¹⁹ or that the bank certificate of a check meant, by the common understanding of bankers, something more than the liability usually implied.⁴²⁰

But parol evidence has been admitted against the payee to show an agreement at the time of making a note that it should be returned if demanded in a certain time, and should be held meanwhile in es-

v. Hurst, 9 Ala. 513; Farmer v. Perry, 70 Iowa, 858, 30 N. W. 752; e. g. to the extent of their community property, Hemrich v. Wist (Wash.) 53 Pac. 710; or on the death of the other, Leonard v. Miner, 120 Cal. 403, 52 Pac. 655.

⁴¹³ Spofford v. Brown, 1 MacArthur, 223; Wharton v. Douglass, 76 Pa. St. 273; Higgins v. O'Donnell, 68 Hun, 100, 22 N. Y. Supp. 610.

⁴¹⁴ Latham v. Flour Mills, 68 Tex. 127, 3 S. W. 462. So, that the note was intended merely as a memorandum, Fellows v. Prentiss, 3 Denio (N. Y.) 512; Western Mfg. Co. v. Rogers (Neb.) 74 N. W. 849; Perry v. Bigelow, 128 Mass. 129; Weaver v. Fries, 85 Ill. 356; Burnes v. Scott, 117 U. S. 582, 6 Sup. Ct. 865; or receipt, Billings v. Billings, 10 Cush. (Mass.) 178; Dickson v. Harris, 60 Iowa, 727, 13 N. W. 335; Shaw v. Shaw, 50 Me. 94; Stoyell v. Stoyell, 82 Me. 332, 19 Atl. 860.

⁴¹⁵ Gillmann v. Henry, 53 Wis. 465, 10 N. W. 692.

⁴¹⁶ Robertson v. Evans, 3 S. C. 330; nor that a maker, who added his name to a joint note five years after its date, was to be held only as a guarantor, if the amount could not be made out of other makers, Jones v. Jeffries, 17 Mo. 577; nor that the maker was acting only as agent for another not named, Junge v. Bowman, 72 Iowa, 648, 34 N. W. 612.

⁴¹⁷ Jordan v. Keeble, 85 Tenn. 412, 3 S. W. 511.

⁴¹⁸ Wood v. Surrells, 89 Ill. 107; Cummings v. Kent, 44 Ohio St. 92, 4 N. E. 710; or a check, American Emigrant Co. v. Clark, 47 Iowa, 671.

⁴¹⁹ Martin v. Lewis, 30 Grat. (Va.) 672.

⁴²⁰ Davis v. Randall, 115 Mass. 547.

⁴²⁰ Security Bank v. National Bank, 67 N. Y. 459.

crow;⁴²¹ or that the plaintiff (indorsee) would look to the indorser,⁴²² or to the funds of the principal maker in his hands,⁴²³ and not hold the accommodation maker. So, it may be shown that one who signs under the maker's signature, or in the usual place of attestation, intended to be held as a maker.⁴²⁴ The admissibility of parol evidence to discharge an agent, or to charge an undisclosed principal, is considered fully in another part of this work.

Liability of Surety.

§ 1902. In general, parol evidence is held to be admissible between immediate indorsers to show their relation to one another as co-sureties or otherwise.⁴²⁵ A distinction has been made in this regard between an action brought for contribution after payment of the note and an action brought on the note itself, the evidence being held not to be admissible in the latter case.⁴²⁶ So, one of two joint and several makers may prove that he was a surety for the other.⁴²⁷ And this has been held to be so as against the payee,⁴²⁸ or a co-maker, who signed below the others, and expressly as "surety";⁴²⁹ or between co-makers as sureties for one another (but not so designat-

⁴²¹ *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408.

⁴²² *Daggett v. Whiting*, 35 Conn. 386. But see, contra, *Armstrong v. Scott*, 36 Fed. 63.

⁴²³ *First Nat. Bank of Winston v. Pegram*, 118 N. C. 671, 24 S. E. 487.

⁴²⁴ *Rape v. Westcott*, 18 N. J. Law, 244. So, where he was named in the instrument as payee. *Cook v. Brown*, 62 Mich. 473, 29 N. W. 46.

⁴²⁵ *Paul v. Rider*, 58 N. H. 119; *Weston v. Chamberlin*, 7 Cush. (Mass.) 404; *Martin v. Marshall*, 60 Vt. 321, 13 Atl. 420; *Camp v. Simmons*, 62 Ga. 73; *Farwell v. Ensign*, 66 Mich. 600, 33 N. W. 734; *Preston v. Gould*, 64 Iowa, 44, 19 N. W. 834.

⁴²⁶ *Phillips v. Preston*, 5 How. 278. And see §§ 778, 779, *supra*.

⁴²⁷ *Emmons v. Overton*, 18 B. Mon. (Ky.) 643; *Bradley Fertilizer Co. v. Caswell*, 65 Vt. 231, 26 Atl. 956; *Eastman v. Cleaver*, 72 Mich. 167, 40 N. W. 238.

⁴²⁸ *Kelley v. Few*, 18 Ohio, 441; *Vestal v. Knight*, 54 Ark. 97, 15 S. W. 17; *Kendall v. Milligan*, 62 Ark. 629, 34 S. W. 78; *First Nat. Bank of Covington v. Gaines*, 87 Ky. 597, 9 S. W. 396; *Cole v. Fox*, 83 N. C. 463. But not where the note reads, "We, as principals, promise," etc. *Wingate v. Blalock*, 15 Wash. 44, 45 Pac. 663. And see § 909, *supra*.

⁴²⁹ *McGee v. Prouty*, 9 Metc. (Mass.) 547. But see *McMahan v. Gelger*, 73 Mo. 145.

ed);⁴³⁰ or against a holder with notice;⁴³¹ or to enforce in the surety's favor an agreement by the payee that only the principal should be held liable, the action being brought by the surety to recover from the payee the payment which he had been obliged to make to a bona fide indorsee.⁴³²

But such evidence is not admissible, as against a bona fide holder, to show that one maker is only surety for the other.⁴³³

Parol Evidence to Vary Indorsement.

§ 1903. Parol evidence is inadmissible to vary the legal effect of a blank indorsement.⁴³⁴ Thus, the indorser cannot show that his indorsement was intended to be without recourse, and he was not to be held liable;⁴³⁵ or that the indorsement was only made to enable the indorsee to sue the maker,⁴³⁶ or to enable the maker to raise

⁴³⁰ *Chapese v. Young*, 87 Ky. 477, 9 S. W. 399; *Mansfield v. Edwards*, 136 Mass. 15; *Montgomery v. Page*, 29 Or. 320, 44 Pac. 689. And see § 908 et seq., *supra*.

⁴³¹ *Stevens v. Oaks*, 58 Mich. 343, 25 N. W. 309; *Welfare v. Thompson*, 83 N. C. 276; *Coffey v. Reinhardt*, 114 N. C. 509, 19 S. E. 370; *Bank of British Columbia v. Jeffs*, 15 Wash. 230, 46 Pac. 247. And see § 910, *supra*.

⁴³² *Graves v. Johnson*, 48 Conn. 160.

⁴³³ *Lewis v. Long*, 102 N. C. 206, 9 S. E. 637; *Christian v. Parrott*, 114 N. C. 215, 19 S. E. 151; *Venable v. Lippold*, 102 Ga. 208, 29 S. E. 181; *Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57. And see § 911, *supra*.

⁴³⁴ *Higgins v. Barrowcliffe*, 46 N. Y. Super. Ct. 540; *National Bank v. Gray*, 18 S. C. 282; *Borup v. Nininger*, 5 Minn. 523 (Gil. 417); *Preston v. Ellington*, 74 Ala. 133. Although the liability assumed by the indorser has been said to be a question of fact. *Liszman v. Marx* (Pa. Sup.) 9 Atl. 477. And see § 778, *supra*. But see, as to irregular indorsements before delivery to the payee, §§ 66, 841, *supra*.

⁴³⁵ *Bank of United States v. Dunn*, 6 Pet. 51; *Odam v. Beard*, 1 Blackf. (Ind.) 191; *Babson v. Webber*, 9 Pick. (Mass.) 163; *Loomis v. Fay*, 24 Vt. 241; *Wilson v. Black*, 6 Blackf. (Ind.) 509; *Goodwin v. Davenport*, 47 Me. 112; *Blair v. Williams*, 7 Blackf. (Ind.) 132; *Crocker v. Getchell*, 23 Me. 392; *Hill v. Shields*, 81 N. C. 250; *Day v. Thompson*, 65 Ala. 269; *Kern v. Von Phul*, 7 Minn. 426 (Gil. 341); *Hutchinson v. Brown*, 8 Mackey (D. C.) 136. Nor, conversely, to show him to be liable notwithstanding the words "without recourse." *Cross v. Hollister*, 47 Kan. 652, 28 Pac. 693. And see § 779, *supra*. But see, as against indorsee after maturity, *Rogers v. Bedell*, 97 Tenn. 240, 36 S. W. 1096.

⁴³⁶ *Price v. Perry*, 2 Mill, Const. (S. C.) 31.

money on the note,⁴³⁷ or to identify the payee.⁴³⁸ In like manner, a surety cannot show that he signed the note merely to encourage the principal, and was not to be liable,⁴³⁹ or was to be liable only for a few days.⁴⁴⁰

But it has been held that it may be shown that an indorser (after maturity) was to be liable only if the maker proved insolvent,⁴⁴¹ or if the holder returned the note promptly on its dishonor,⁴⁴² or with the proviso that the maker be first sued.⁴⁴³ But it cannot be shown that the indorsement created no contract whatever,⁴⁴⁴ or that the indorser, by a contemporaneous verbal agreement, waived presentment and notice of dishonor,⁴⁴⁵ or the diligence required by statute,⁴⁴⁶ or intended to become liable as co-maker.⁴⁴⁷

An agreement may, however, be shown that notes discounted at a particular bank, and naming no place of payment, may be demanded at the bank.⁴⁴⁸

⁴³⁷ *Hall v. Newcomb*, 7 Hill (N. Y.) 416.

⁴³⁸ *Stack v. Beach*, 74 Ind. 571. Or as director of the corporation maker, to approve its act. *Gibson v. Machine Co.*, 124 Mass. 546.

⁴³⁹ *Dendy v. Gamble*, 59 Ga. 434.

⁴⁴⁰ *Mansfield v. Barber*, Id. 851.

⁴⁴¹ *Taylor v. Scholfeld*, 2 Cranch, C. C. 315, Fed. Cas. No. 13,804.

⁴⁴² *Brewer v. Woodward*, 54 Vt. 581.

⁴⁴³ *Wright v. Latham*, 7 N. C. 298. And see *Iredell Co. Com'rs v. Wasson*, 82 N. C. 308; *Cake v. Bank*, 116 Pa. St. 264, 9 Atl. 302.

⁴⁴⁴ *Geneser v. Wissner*, 69 Iowa, 119, 28 N. W. 471. And that the payee's name was written across the face of the note, only to signify his acceptance of it, *Perry v. Bray*, 68 Ga. 293.

⁴⁴⁵ *Bank of Albion v. Smith*, 27 Barb. (N. Y.) 489; *Anderson v. Yell*, 15 Ark. 9. And see § 1369, *supra*. But a parol waiver may be given on the day of maturity, *Mills v. Beard*, 19 Cal. 158; or on indorsement after maturity, *Sanborn v. Southard*, 25 Me. 409. But see, *contra*, *Patterson v. Vose*, 43 Me. 552.

⁴⁴⁶ *Allen v. Rundle*, 50 Conn. 9.

⁴⁴⁷ *Harvard Pub. Co. v. Benjamin*, 84 Md. 333, 35 Atl. 930.

⁴⁴⁸ *Pearson v. Bank*, 1 Pet. 89; *Marshall, C. J.*, saying: "This is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person when the parties are silent is an inference of law which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand." But see *Bank of Alexandria v. Deneale*, 2 Cranch, C. C. 488, Fed. Cas. No. 846. And, if it is made payable at a bank, it cannot

Full consideration has been given in an earlier part of this work to the admissibility of parol evidence to qualify an indorsement in blank,⁴⁴⁹ or to show the relation of successive indorsers inter se.⁴⁵⁰

Contemporary Writing.

§ 1904. The rule against parol evidence to alter a written instrument by a contemporaneous verbal agreement does not apply where the contemporaneous agreement offered is also in writing, although it may, in effect, do away with the note or indorsement;⁴⁵¹ or to an agreement that has been already acted on;⁴⁵² or to a case where it would be a fraud on the maker to allow the payee to enforce a note which had been given him for a special purpose.⁴⁵³

be shown that it was not negotiated there, and that notice was, therefore, unnecessary. *Anthony v. Pittman*, 66 Ga. 701.

⁴⁴⁹ See § 778, *supra*.

⁴⁵⁰ See § 741, *supra*.

⁴⁵¹ *Davis v. Brown*, 94 U. S. 423. And an indorser cannot disclaim a waiver of demand and notice, expressed in a written memorandum on the back of the note, by showing that he did not regard it as part of his contract. *Farmers' Bank of Kentucky v. Ewing*, 78 Ky. 264. But the charter of an insurance company forms no part of the contract contained in a previous note, and a contemporaneous verbal agreement that it should control the note cannot be shown. *American Ins. Co. v. Gallahan*, 75 Ind. 168. As to the effect of contemporaneous agreements, see § 197, *supra*.

⁴⁵² *Manufacturers' Bank of Troy v. Scofield*, 39 Vt. 590.

⁴⁵³ *Schindler v. Muhlheiser*, 45 Conn. 153.

APPENDIX I.

AMERICAN STATUTES.

- I. NEGOTIABLE INSTRUMENTS LAW.
II. CALIFORNIA CODES.

THE NEGOTIABLE INSTRUMENTS LAW.

(AS ADOPTED IN NEW YORK.)

[This act has been adopted, substantially as printed here, in COLORADO, Laws 1897, c. 64; CONNECTICUT, Laws 1897, c. 74; FLORIDA, Laws 1897, c. 4524; MARYLAND, Laws 1898, c. 119; NEW YORK, Laws 1897, c. 612; VIRGINIA, Laws 1898, c. 866.]

[The section numbers in parentheses are those of Colorado, Florida, Virginia, and generally of Connecticut. In Maryland, §§ 20-208 correspond with §§ 1-189 of the Colorado statute, and §§ 14-19 with §§ 2-7 of the New York statute.]

THE NEGOTIABLE INSTRUMENTS LAW.

- Article I. General Provisions. (§§ 1-7.)
- II. Form and Interpretation of Negotiable Instruments. (§§ 20-42.)
 - III. Consideration. (§§ 50-55.)
 - IV. Negotiation. (§§ 60-80.)
 - V. Rights of Holders. (§§ 90-98.)
 - VI. Liabilities of Parties. (§§ 110-119.)
 - VII. Presentment for Payment. (§§ 130-148.)
 - VIII. Notice of Dishonor. (§§ 160-189.)
 - IX. Discharge of Negotiable Instruments. (§§ 200-206.)
 - X. Bills of Exchange—Form of Interpretation. (§§ 210-215.)
 - XI. Acceptance. (§§ 220-230.)
 - XII. Presentment for Acceptance. (§§ 240-248.)
 - XIII. Protest. (§§ 260-268.)
 - XIV. Acceptance for Honor. (§§ 280-289.)
 - XV. Payment for Honor. (§§ 300-306.)
 - XVI. Bills in a Set. (§§ 310-315.)
 - XVII. Promissory Notes and Checks. (§§ 320-325.)
 - XVIII. Notes Given for a Patent Right and for a Speculative Consideration. (§§ 330-332.)
 - XIX. Laws Repealed, When to Take Effect. (§§ 340, 341.) [These sections vary in the different states which have enacted this statute, and are therefore not printed here.]

ARTICLE I.**GENERAL PROVISIONS.**

- Section** 1. Short Title.
2. Definitions and Meaning of Terms.
3. Persons Primarily Liable on Instrument.
4. Reasonable Time, What Constitutes.
5. Time, How Computed; When Last Day Falls on Holiday.
6. Application of Chapter.
7. Rule of Law Merchant; When Governs.

Section 1 (190). *Short Title.*

This act shall be known as the Negotiable Instruments Law.

Sec. 2 (191). *Definitions and Meaning of Terms.*

In this act, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

Sec. 3 (192). *Person Primarily Liable on Instrument.*

The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

Sec. 4 (193). *Reasonable Time, What Constitutes.*

In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

Sec. 5 (194). *Time, How Computed.*

When last day falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Sec. 6 (195). *Application of Chapter.*

The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

Sec. 7 (196). *Law Merchant; When Governs.*

In any case not provided for in this act the rules of the law merchant shall govern.

ARTICLE II.**FORM AND INTERPRETATION.**

- Section** 20. Form of Negotiable Instrument.
21. Certainty as to Sum; What Constitutes.
22. When Promise is Unconditional.
23. Determinable Future Time; What Constitutes.
24. Additional Provisions not Affecting Negotiability.
25. Omissions; Seal; Particular Money.
26. When Payable on Demand.
27. When Payable to Order.
28. When Payable to Bearer.
29. Terms, When Sufficient.
30. Date, Presumption as to.
31. Ante-Dated and Post-Dated.
32. When Date May be Inserted.
33. Blanks, When May be Filled.
34. Incomplete Instrument not Delivered.
35. Delivery; When Effectual; When Presumed.
36. Construction where Instrument is Ambiguous.
37. Liability of Persons Signing in Trade or Assumed Name.
38. Signature by Agent; Authority; How Shown.
39. Liability of Person Signing as Agent, etc.
40. Signature by Procuration; Effect of.
41. Effect of Indorsement by Infant or Corporation.
42. Forged Signature; Effect of.

Sec. 20 (1). *Form of Negotiable Instrument.*

An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and
5. Where the instrument is addressed to a drawer, he must be named or otherwise indicated therein with reasonable certainty.

Sec. 21 (2). *Certainty as to Sum; What Constitutes.*

The sum payable is a sum certain within the meaning of this act although it is to be paid:

1. With interest; or
2. By stated installments; or
3. By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

Sec. 22 (3). *When Promise is Unconditional.*

An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument,

But an order or promise to pay out of a particular fund is not unconditional.

Sec. 23 (4). *Determinable Future Time; What Constitutes.*

An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain,

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

Sec. 24 (5). *Additional Provisions not Affecting Negotiability.*

An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the ne-

gotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

Sec. 25 (6). Omissions; Seal; Particular Money.

The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Sec. 26 (7). When Payable on Demand.

An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

Sec. 27 (8). *When Payable to Order.*

The instrument is payable to order where it is drawn payable to order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

Sec. 28 (9). *When Payable to Bearer.*

The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

Sec. 29 (10). *Terms, When Sufficient.*

The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

Sec. 30 (11). *Date, Presumption as to.*

Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement as the case may be.

Sec. 31 (12). *Ante-Dated and Post-Dated.*

The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

Sec. 32 (13). *When Date May be Inserted.*

Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not void the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

Sec. 33 (14). *Blanks; When May be Filled.*

Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiable to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

Sec. 34 (15). *Incomplete Instrument not Delivered.*

Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

Sec. 35 (16). *Delivery; When Effectual; When Presumed.*

Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case

may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Sec. 36 (17). *Construction where Instrument is Ambiguous.*

Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;
3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;
4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;
6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;
7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Sec. 37 (18). *Liability of Person Signing in Trade or Assumed Name.*

No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Sec. 38 (19). *Signature by Agent; Authority; How Shown.*

The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency,

Sec. 39 (20). *Liability of Person Signing as Agent, etc.*

Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

Sec. 40 (21). *Signature by Procuration; Effect of.*

A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority,

Sec. 41 (22). *Effect of Indorsement by Infant or Corporation.*

The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

Sec. 42 (23). *Forged Signature; Effect of.*

Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

ARTICLE III.**CONSIDERATION OF NEGOTIABLE INSTRUMENTS.**

- Section** 50. Presumption of Consideration.
51. What Constitutes Consideration.
52. What Constitutes Holder for Value.
53. When Lien on Instrument Constitutes Holder for Value.
54. Effect of Want of Consideration.
55. Liability of Accommodation Indorser.

Sec. 50 (24). *Presumption of Consideration.*

Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

Sec. 51 (25). *Consideration; What Constitutes.*

Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

Sec. 52 (26). *What Constitutes Holder for Value.*

Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Sec. 53 (27). *When Lien on Instrument Constitutes Holder for Value.*

Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Sec. 54 (28). *Effect of Want of Consideration.*

Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto whether the failure is an ascertained and liquidated amount or otherwise.

Sec. 55 (29). *Liability of Accommodation Indorser.*

An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value

therefor, and for the purpose of lending his name to some other person. Such person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

ARTICLE IV.

NEGOTIATION.

- Section 60. What Constitutes Negotiation.
- 61. Indorsement; How Made.
 - 62. Indorsement Must be of Entire Instrument.
 - 63. Kinds of Indorsement.
 - 64. Special Indorsement; Indorsement in Blank.
 - 65. Blank Indorsement; How Changed to Special Indorsement.
 - 66. When Indorsement Restrictive.
 - 67. Effect of Restrictive Indorsement; Rights of Indorsee.
 - 68. Qualified Indorsement.
 - 69. Conditional Indorsement.
 - 70. Indorsement of Instrument Payable to Bearer.
 - 71. Indorsement when Payable to Two or More Persons.
 - 72. Effect of Instrument Drawn or Indorsed to a Person as Cashier.
 - 73. Indorsement where Name is Misspelled, et cetera.
 - 74. Indorsement in Representative Capacity.
 - 75. Time of Indorsement; Presumption.
 - 76. Place of Indorsement; Presumption.
 - 77. Continuation of Negotiable Character.
 - 78. Striking Out Indorsement.
 - 79. Transfer without Indorsement; Effect of.
 - 80. When Prior Party may Negotiate Instrument.

Sec. 60 (30). *What Constitutes Negotiation.*

An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

Sec. 61 (31). *Indorsement; How Made.*

The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

Sec. 62 (32). *Indorsement Must be of Entire Instrument.*

The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsee severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

Sec. 63 (33). *Kinds of Indorsement.*

An indorsement may be either special or in blank; and it may also be either restrictive or qualified or conditional.

Sec. 64 (34). *Special Indorsement; Indorsement in Blank.*

A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

Sec. 65 (35). *Blank Indorsement; How Changed to Special Indorsement.*

The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

Sec. 66 (36). *When Indorsement Restrictive.*

An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person,

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Sec. 67 (37). *Effect of Restricting Indorsement; Rights of Indorsee.*

A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

Sec. 68 (38). *Qualified Indorsement Constitutes the Indorser a Mere Assignor of the Title to the Instrument.*

It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

Sec. 69 (39). *Conditional Indorsement.*

Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

Sec. 70 (40). *Indorsement of Instrument Payable to Bearer.*

Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

Sec. 71 (41). *Indorsement when Payable to Two or More Persons.*

When an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

Sec. 72 (42). *Effect of Instrument Drawn or Indorsed to a Person as Cashier.*

Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

Sec. 73 (43). *Indorsement where Name is Misspelled, et cetera.*

Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

Sec. 74 (44). *Indorsement in Representative Capacity.*

Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

Sec. 75 (45). *Time of Indorsement; Presumption.*

Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

Sec. 76 (46). *Place of Indorsement; Presumption.*

Except where the contrary appears every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

Sec. 77 (47). *Continuation of Negotiable Character.*

An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Sec. 78 (48). *Striking Out Indorsement.*

The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

Sec. 79 (49). *Transfer without Indorsement; Effect of.*

Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Sec. 80 (50). *When Said Party may Negotiate Instrument.*

Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE V.**RIGHTS OF HOLDERS.**

- Section 90. Right of Holder to Sue; Payment.
91. What Constitutes a Holder in Due Course.
92. When Person not Deemed Holder in Due Course.
93. Notice before Full Amount Paid.
94. When Title Defective.
95. What Constitutes Notice of Defect.
96. Rights of Holder in Due Course.
97. When Subject to Original Defenses.
98. Who Deemed Holder in Due Course.

Sec. 90 (51). *Right of Holder to Sue; Payment.*

The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

Sec. 91 (52). *What Constitutes a Holder in Due Course.*

A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Sec. 92 (53). *When Person not Deemed Holder in Due Course.*

Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

Sec. 93 (54). *Notice before Full Amount Paid.*

Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid thereof, he

will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

Sec. 94 (55). *When Title Defective.*

The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

Sec. 95 (56). *What Constitutes Notice of Defect.*

To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Sec. 96 (57). *Rights of Holder in Due Course.*

A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Sec. 97 (58). *When Subject to Original Defenses.*

In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Sec. 98 (59). *Who Deemed Holder in Due Course.*

Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title,

ARTICLE VI.**LIABILITIES OF PARTIES.**

- Section 110. Liability of Maker.**
111. Liability of Drawer.
112. Liability of Acceptor.
113. When Person Deemed Indorser.
114. Liability of Irregular Indorser.
115. Warranty; Where Negotiation by Delivery, et cetera.
116. Liability of General Indorsers.
117. Liability of Indorser where Paper Negotiable by Delivery.
118. Order in which Indorsers are Liable.
119. Liability of Agent or Broker.

Sec. 110 (60). *Liability of Maker.*

The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

Sec. 111 (61). *Liability of Drawer.*

The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

Sec. 112 (62). *Liability of Acceptor.*

The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

Sec. 113 (63). *When Person Deemed Indorser.*

A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless

he clearly indicates by appropriate words his intention to be bound in some other capacity.

Sec. 114 (64). *Liability of Irregular Indorser.*

Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the payee.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Sec. 115 (65). *Warranty; Where Negotiation by Delivery, et cetera.*

Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

Sec. 116 (66). *Liability of General Indorser.*

Every indorser who indorses without qualifications, warrants to all subsequent holders in due course:

1. The matter and things mentioned in subdivisions one, two, and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor,

and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

Sec. 117 (67). *Liability of Indorser where Paper Negotiable by Delivery.*

Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

Sec. 118 (68). *Order in which Indorsers are Liable.*

As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

Sec. 119 (69). *Liability of Agent or Broker.*

Where a broker or other agent negotiates an instrument without indorsement he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

ARTICLE VII.**PRESENTMENT FOR PAYMENT.**

- Section 130.** Effect of Want of Demand on Principal Debtor.
- 131. Presentment where Instrument is not Payable on Demand.
 - 132. What Constitutes a Sufficient Presentment.
 - 133. Place of Presentment.
 - 134. Instrument Must be Exhibited.
 - 135. Presentment where Instrument Payable at Bank.
 - 136. Presentment where Principal Debtor is Dead.
 - 137. Presentment to Persons Liable as Partners.
 - 138. Presentment to Joint Debtors.
 - 139. When Presentment not Required to Charge the Drawer.
 - 140. When Presentment not Required to Charge the Indorser.
 - 141. When Delay in Making Presentment is Excused.
 - 142. When Presentment May be Dispensed With.
 - 143. When Instrument Dishonored by Non-Payment.
 - 144. Liability of Persons Secondarily Liable, When Instrument Dishonored.
 - 145. Time of Maturity.
 - 146. Time; How Computed.
 - 147. Rule where Instrument Payable at Bank.
 - 148. What Constitutes Payment in Due Course.

Sec. 130 (70). *Effect of Want of Demand on Principal Debtor.*

Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

Sec. 131 (71). *Presentment where Instrument is not Payable on Demand.*

Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

Sec. 132 (72). *What Constitutes Sufficient Presentment.*

Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

Sec. 133 (73). *Place of Presentment.*

Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person making payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Sec. 134 (74). *Instrument Must be Exhibited.*

The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

Sec. 135 (75). *Presentment where Instrument Payable at Bank.*

Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

Sec. 136 (76). *Presentment where Principal Debtor is Dead.*

Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be

made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found.

Sec. 137 (77). *Presentment to Persons Liable as Partners.*

Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Sec. 138 (78). *Presentment to Joint Debtors.*

Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

Sec. 139 (79). *When Presentment not Required to Charge the Drawer.*

Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

Sec. 140 (80). *When Presentment not Required to Charge the Indorser.*

Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

Sec. 141 (81). *When Delay in Making Presentment is Excused.*

Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Sec. 142 (82). *When Presentment May be Dispensed with.*

Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act can not be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment express or implied.

Sec. 143 (83). *When Instrument Dishonored by Non-Payment.*

The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or can not be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

Sec. 144 (84). *Liability of Person Secondarily Liable, When Instrument Dishonored.*

Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

Sec. 145 (85). *Time of Maturity.*

Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

Sec. 146 (86). *Time; How Computed.*

Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

Sec. 147 (87). *Rule where Instrument Payable at Bank.*

Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

Sec. 148 (88). *What Constitutes Payment in Due Course.*

Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

ARTICLE VIII.**NOTICE OF DISHONOR.**

- Section 160.** To Whom Notice of Dishonor Must be Given.
- 161. By Whom Given.
 - 162. Notice Given by Agent.
 - 163. Effect of Notice Given on Behalf of Holder.
 - 164. Effect where Notice is Given by Party Entitled Thereto.
 - 165. When Agent may Give Notice.
 - 166. When Notice Sufficient.
 - 167. Form of Notice.
 - 168. To Whom Notice May be Given.
 - 169. Notice where Party is Dead.
 - 170. Notice to Partners.
 - 171. Notice to Persons Jointly Liable.
 - 172. Notice to Bankrupt.
 - 173. Time within Which Notice Must be Given.
 - 174. Where Parties Reside in Same Place.
 - 175. Where Parties Reside in Different Places.
 - 176. When Sender Deemed to have Given Due Notice.
 - 177. Deposit in Post-Office, What Constitutes.
 - 178. Notice to Subsequent Parties, Time of.
 - 179. Where Notice Must be Sent.
 - 180. Waiver of Notice.
 - 181. Whom Affected by Waiver.
 - 182. Waiver of Protest.
 - 183. When Notice Dispensed with.
 - 184. Delay in Giving Notice; How Excused.
 - 185. When Notice Need not be Given to Drawer.
 - 186. When Notice Need not be Given to Indorser.
 - 187. Notice of Non-Payment where Acceptance Refused.
 - 188. Effect of Omission to Give Notice of Non-Acceptance.
 - 189. When Protest Need not be Made; When Must be Made.

Sec. 160 (89). *To Whom Notice of Dishonor Must be Given.*

Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

Sec. 161 (90). *By Whom Given.*

The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up would have a right to reimbursement from the party to whom the notice is given.

Sec. 162 (91). *Notice Given by Agent.*

Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

Sec. 163 (92). *Effect of Notice Given on Behalf of Holder.*

Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Sec. 164 (93). *Effect where Notice is Given by Party Entitled Thereto.*

Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

Sec. 165 (94). *When Agent may Give Notice.*

Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

Sec. 166 (95). *When Notice Sufficient.*

A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given by delivery is in fact misled thereby.

Sec. 167 (96). *Form of Notice.*

The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It

may in all cases be given by delivering it personally or through the mails.

Sec. 168 (97). *To Whom Notice May be Given.*

Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Sec. 169 (98). *Notice where Party is Dead.*

When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Sec. 170 (99). *Notice to Partners.*

Where the parties to be notified are partners notice to any one partner is notice to the firm even though there has been a dissolution.

Sec. 171 (100). *Notice to Persons Jointly Liable.*

Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

Sec. 172 (101). *Notice to Bankrupt.*

Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

Sec. 173 (102). *Time within Which Notice Must be Given.*

Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

Sec. 174 (103). *Where Parties Reside in Same Place.*

Where the person giving and the person to receive reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;

2. If given at his residence, it must be given before the usual hours of rest on the day following;

3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

Sec. 175 (104). *Where Parties Reside in Different Places.*

Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

Sec. 176 (105). *When Sender Deemed to have Given Due Notice.*

Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Sec. 177 (106). *Deposit in Post-Office; What Constitutes.*

Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.

Sec. 178 (107). *Notice to Subsequent Party; Time of.*

Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Sec. 179 (108). *Where Notice Must be Sent.*

Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or,

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or,

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient though not sent in accordance with the requirements of this section.

Sec. 180 (109). *Waiver of Notice.*

Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied.

Sec. 181 (110). *Whom Affected by Waiver.*

Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

Sec. 182 (111). *Waiver of Protest.*

A waiver of protest whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

Sec. 183 (112). *When Notice is Dispensed with.*

Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged.

Sec. 184 (113). *Delay in Giving Notice; How Excused.*

Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Sec. 185 (114). *When Notice Need not be Given to Drawer.*

Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;

3. Where the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;

5. Where the drawer has countermanded payment.

Sec. 186 (115). *When Notice Need not be Given to Indorser.*

Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

2. Where the indorser is the person to whom the instrument is presented for payment;

3. Where the instrument was made or accepted for his accommodation.

Sec. 187 (116). *Notice of Non-Payment where Acceptance Refused.*

Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

Sec. 188 (117). *Effect of Omission to Give Notice of Non-Acceptance.*

An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Sec. 189 (118). *When Protest Need not be Made; When Must be Made.*

Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

ARTICLE IX.**DISCHARGE OF NEGOTIABLE INSTRUMENTS.**

Section 200. Instrument; How Discharged.

201. When Persons Secondly Liable on, Discharged.

202. Right of Party who Discharges Instrument.

203. Renunciation by Holder.

204. Cancellation; Unintentional; Burden of Proof.

205. Alteration of Instrument; Effect of.

206. What Constitutes a Material Alteration.

Sec. 200 (119). *Instrument; How Discharged.*

A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

Sec. 201 (120). *When Person Secondly Liable on, Discharged.*

A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party;

4. By a valid tender of payment made by a prior party;

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved.

Sec. 202 (121). *Right of Party who Discharges Instrument.*

Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former

rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and,
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

Sec. 203 (122). *Renunciation by Holder.*

The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

Sec. 204 (123). *Cancellation; Unintentional; Burden of Proof.*

A cancellation made unintentionally, or under a mistake or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

Sec. 205 (124). *Alteration of Instrument; Effect of.*

Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

Sec. 206 (125). *What Constitutes a Material Alteration.*

Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;

4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

ARTICLE X.

BILLS OF EXCHANGE—FORM AND INTERPRETATION.

Section 210. Bill of Exchange Defined.

211. Bill not an Assignment of Funds in Hands of Drawee.
212. Bill Addressed to More than One Drawee.
213. Inland and Foreign Bills of Exchange.
214. When Bill May be Treated as Promissory Note.
215. Drawee in Case of Need.

Sec. 210 (126). *Bill of Exchange Defined.*

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed determinable future time a sum certain in money to order or to bearer.

Sec. 211 (127). *Bill not an Assignment of Funds in Hands of Drawee.*

A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof and the drawee is not liable on the bill unless and until he accepts the same.

Sec. 212 (128). *Bill Addressed to More than One Drawee.*

A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not, to two or more drawees in the alternative or in succession.

Sec. 213 (129). *Inland and Foreign Bills of Exchange.*

An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

Sec. 214 (130). *When Bill May be Treated as Promissory Note.*

Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

Sec. 215 (131). *Drawee in Case of Need.*

The drawer of a bill and any indorser may insert thereon the name of person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

ARTICLE XI.

ACCEPTANCE OF BILLS OF EXCHANGE.

- Section 220. Acceptance, How Made, et cetera.
221. Holder Entitled to Acceptance on Face of Bill.
222. Acceptance by Separate Instrument.
223. Promise to Accept; When Equivalent to Acceptance.
224. Time Allowed Drawee to Accept.
225. Liability of Drawee Retaining or Destroying Bill.
226. Acceptance of Incomplete Bill.
227. Kinds of Acceptance.
228. What Constitutes a General Acceptance.
229. Qualified Acceptance.
230. Rights of Parties as to Qualified Acceptance.

Sec. 220 (132). *Acceptance; How Made, et cetera.*

The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

Sec. 221 (133). *Holder Entitled to Acceptance on Face of Bill.*

The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and if such request is refused, may treat the bill as dishonored.

Sec. 222 (134). *Acceptance by Separate Instrument.*

Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Sec. 223 (135). *Promise to Accept; When Equivalent to Acceptance.*

An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

Sec. 224 (136). *Time Allowed Drawee to Accept.*

The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

Sec. 225 (137). *Liability of Drawee Retaining or Destroying Bill.*

Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

Sec. 226 (138). *Acceptance of Incomplete Bill.*

A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

Sec. 227 (139). *Kinds of Acceptance.*

An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Sec. 228 (140). *What Constitutes a General Acceptance.*

An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

Sec. 229 (141). *Qualified Acceptance.*

An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay only at a particular place;
3. Local, that is to say, an acceptance at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

Sec. 230 (142). *Rights of Parties as to Qualified Acceptance.*

The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assented thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE XII.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

Section 240. When Presentment for Acceptance Must be Made.

241. When Failure to Present Releases Drawer and Indorser.
242. Presentment; How Made.
243. On what Days Presentment May be Made.
244. Presentment; Where Time is Insufficient.
245. When Presentment is Excused.
246. When Dishonored by Non-Acceptance.
247. Duty of Holder where Bill not Accepted.
248. Rights of Holder where Bill not Accepted.

Sec. 240 (143). *When Presentment for Acceptance Must be Made.*

Presentment of acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or,

2. Where the bill expressly stipulates that it shall be presented for acceptance; or,

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary, in order to render any party to the bill liable.

Sec. 241 (144). *When Failure to Present Releases Drawer and Indorser.*

Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

Sec. 242 (145). *Presentment; How Made.*

Presentment for acceptance must be made by or on behalf of the holder at a reasonable time, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustees or assignee.

Sec. 243 (146). *On what Days Presentment May be Made.*

A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two (should be 132) and eighty-five (should be 145) of this act. When Saturday is not otherwise a holiday, present-

ment for acceptance may be made before twelve o'clock noon on that day.

Sec. 244 (147). *Presentment; Where Time is Insufficient.*

Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

Sec. 245 (148). *Where Presentment is Excused.*

Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill;
2. Where after the exercise of reasonable diligence, presentment cannot be made;
3. Where although presentment has been irregular, acceptance has been refused on some other ground.

Sec. 246 (149). *When Dishonored by Non-Acceptance.*

A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or can not be obtained; or,
2. When presentment for acceptance is excused and the bill is not accepted.

Sec. 247 (150). *Duty of Holder where Bill not Accepted.*

Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Sec. 248 (151). *Rights of Holder where Bill not Accepted.*

When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

ARTICLE XIII.**PROTEST OF BILLS OF EXCHANGE.****Section 260. In what Cases Protest Necessary.**

- 261. Protest; How Made.
- 262. Protest; By Whom Made.
- 263. Protest; When to be Made.
- 264. Protest; Where Made.
- 265. Protest Both for Non-Acceptance and Non-Payment.
- 266. Protest before Maturity where Acceptor Insolvent.
- 267. When Protest Dispensed with.
- 268. Protest; Where Bill is Lost, et cetera.

Sec. 260 (152). *In what Cases Protest Necessary.*

Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

Sec. 261 (153). *Protest; How Made.*

The protest must be made annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Sec. 262 (154). *Protest; By Whom Made.*

Protest may be made by:

1. A notary public; or,
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Sec. 263 (155). *Protest; When to be Made.*

When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

Sec. 264 (156). *Protest; Where Made.*

A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Sec. 265 (157). *Protest Both for Non-Acceptance and Non-Payment.*

A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Sec. 266 (158). *Protest before Maturity where Acceptor Insolvent.*

Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

Sec. 267 (159). *When Protest Dispensed with.*

Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Sec. 268 (160). *Protest where Bill is Lost, et cetera.*

Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE XIV.**ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.**

- Section 280.** When Bill May be Accepted for Honor.
281. Acceptance for Honor; How Made.
282. When Deemed to be an Acceptance for Honor of the Drawer.
283. Liability of Acceptor for Honor.
284. Agreement of Acceptor for Honor.
285. Maturity of Bill Payable after Sight; Accepted for Honor.
286. Protest of Bill Accepted for Honor, et cetera.
287. Presentment for Payment to Acceptor for Honor; How Made.
288. When Delay in Making Presentment is Excused.
289. Dishonor of Bill by Acceptor for Honor.

Sec. 280 (161). *When Bill May be Accepted for Honor.*

Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn.

The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

Sec. 281 (162). *Acceptance for Honor; How Made.*

An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

Sec. 282 (163). *When Deemed to be an Acceptance for Honor of the Drawer.*

Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Sec. 283 (164). *Liability of Acceptor for Honor.*

The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Sec. 284 (165). *Agreement of Acceptor for Honor.*

The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given him.

Sec. 285 (166). *Maturity of Bill Payable after Sight; Accepted for Honor.*

Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

Sec. 286 (167). *Protest of Bill Accepted for Honor, et cetera.*

Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

Sec. 287 (168). *Presentment for Payment to Acceptor for Honor; How Made.*

Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section seventy-five.

Sec. 288 (169). *When Delay in Making Presentment is Excused.*

The provisions of section one hundred and forty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Sec. 289 (170). *Dishonor of Bill by Acceptor for Honor.*

When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE XV.**PAYMENT OF BILLS OF EXCHANGE FOR HONOR.**

Section 300. Who may Make Payment for Honor.

301. Payment for Honor; How Made.

302. Declaration before Payment for Honor.

303. Preference of Parties Offering to Pay for Honor.

304. Effect on Subsequent Parties where Bill is Paid for Honor.

305. Where Holder Refuses to Receive Payment Supra Protest.

306. Rights of Payer for Honor.

Sec. 300 (171). *Who may Make Payment for Honor.*

Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

Sec. 301 (172). *Payment for Honor; How Made.*

The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

Sec. 302 (173). *Declaration before Payment for Honor.*

The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

Sec. 303 (174). *Preference of Parties Offering to Pay for Honor.*

Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

Sec. 304 (175). *Effect on Subsequent Parties where Bill is Paid for Honor.*

Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

Sec. 305 (176). *Where Holder Refuses to Receive Payment Supra Protest.*

Where holder refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

Sec. 306 (177). *Rights of Payer for Honor.*

The payer for honor on payment to the holder of the amount of the bill and the notarial expenses incident to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE XVI.

BILLS IN A SET.

Section 310. Bills in Sets Constitute One Bill.

311. Rights of Holders where Different Parts are Negotiated.

312. Liability of Holder who Indorses Two or More Parts of a Set to Different Persons.

313. Acceptance of Bills Drawn in Sets.

314. Payment by Acceptor of Bills Drawn in Sets.

315. Effect of Discharging One of a Set.

Sec. 310 (178). *Bills in Sets Constitute One Bill.*

Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

Sec. 311 (179). *Rights of Holders where Different Parts are Negotiated.*

Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Sec. 312 (180). *Liability of Holder who Indorses Two or More Parts of a Set to Different Persons.*

Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

Sec. 313 (181). *Acceptance of Bills Drawn in Sets.*

The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

Sec. 314 (182). *Payment by Acceptor of Bills Drawn in Sets.*

When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Sec. 315 (183). *Effect of Discharging One of a Set.*

Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

ARTICLE XVII.

PROMISSORY NOTES AND CHECKS.

Section 320. Promissory Note Defined.**321. Check Defined.****322. Within what Time a Check Must be Presented.****323. Certification of Check; Effect of.****324. Effect where Holder of Check Procures it to be Certified.****325. When Check Operates as an Assignment.****Sec. 320 (184). *Promissory Note Defined.***

A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

Sec. 321 (185). *Check Defined.*

A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

Sec. 322 (186). *Within what Time a Check Must be Presented.*

A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

Sec. 323 (187). *Certification of Check; Effect of.*

Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

Sec. 324 (188). *Effect where the Holder of Check Procures it to be Certified.*

Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

Sec. 325 (189). *When Check Operates as an Assignment.*

A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

ARTICLE XVIII.

NOTES GIVEN FOR A PATENT RIGHT AND FOR A SPECULATIVE CONSIDERATION.

Section 330. Negotiable Instruments Given for Patent Rights.

331. Negotiable Instruments Given for a Speculative Consideration.

332. How Negotiable Bonds are Made Non-Negotiable.

Sec. 330. *Negotiable Instruments Given for Patent Rights.*

A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

Sec. 331. *Negotiable Instruments for a Speculative Consideration.*

If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

Sec. 332. *How Negotiable Bonds are Made Non-Negotiable.*

The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this state, but not registered in pursuance of any state law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon, that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or order, with the addition of the assignor's place of residence.

CALIFORNIA CODES.

A. CIVIL CODE OF 1872 (TITLE XV.).

N. B. The larger number is that of the complete Codes. The smaller one indicates the Civil Code.

CHAPTER I.

ARTICLE I.

GENERAL DEFINITIONS.

8086. *To what instruments this title is applicable.*

3086. The provisions of this title apply only to negotiable instruments as defined in this article.

8087. *Negotiable instruments, what.*

3087. A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article.

8088. *Must be for unconditional payment of money.*

3088. A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment.

8089. *Payee.*

3089. The person to whose order a negotiable instrument is made payable must be ascertainable at the time the instrument is made.

8090. *Instrument may be in alternative.*

3090. A negotiable instrument may give to the payee an option between the payment of the sum specified therein and the performance of another act; but as to the latter the instrument is not within the provisions of this title.

8091. *Date, etc.*

3091. A negotiable instrument may be with or without date, and with or without designation of the time or place of payment.

8092. *May contain a pledge, etc.*

3092. A negotiable instrument may contain a pledge of collateral security, with authority to dispose thereof.

8093. *What it must not contain.*

3093. A negotiable instrument must not contain any other contract than such as is specified in this article.

8094. *Date.*

3094. Any date may be inserted by the maker of a negotiable instrument, whether past, present, or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date.

8095. *Different classes of negotiable instruments.*

3095. There are six classes of negotiable instruments, namely:

1. Bills of exchange;
2. Promissory notes;
3. Bank notes;
4. Checks;
5. Bonds;
6. Certificates of deposit.

ARTICLE II.

INTERPRETATION OF NEGOTIABLE INSTRUMENTS.

8099. *Time and place of payment.*

3099. A negotiable instrument which does not specify the time of payment, is payable immediately.

8100. *Place of payment not specified.*

3100. A negotiable instrument which does not specify a place of payment, is payable at the residence or place of business of the maker, or wherever he may be found.

8101. *Instruments payable to a person or his order, how construed.*

3101. An instrument, otherwise negotiable in form, payable to a person named, but with the words added "to his order," or "to bearer," or words equivalent thereto, is in the former case payable to the written order only of such person, and in the latter case payable to the bearer.

8102. *Unindorsed note, when negotiable.*

3102. A negotiable instrument, made payable to the order of the maker, or of a fictitious person, if issued by the maker for a valid consideration, without indorsement, has the same effect against him and all other persons having notice of the facts as if payable to the bearer.

8103. *Fictitious payee.*

3103. A negotiable instrument made payable to the order of a person obviously fictitious, is payable to the bearer.

8104. *Presumption of consideration.*

3104. The signature of every drawer, acceptor, and indorser of a negotiable instrument is presumed to have been made for a valuable consideration, before the maturity of the instrument, and in the ordinary course of business.

ARTICLE III.

INDORSEMENT.

8108. *Indorsement, what.*

3108. One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an indorser, and his act is called indorsement.

8109. *Agreement to indorse.*

3109. One who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose.

8110. *When may be made on separate paper.*

3110. When there is not room for a signature upon the back of a negotiable instrument, a signature equivalent to an indorsement thereof may be made upon a paper annexed thereto.

8111. *Kinds of indorsement.*

3111. An indorsement may be general or special.

8112. *General indorsement, what.*

3112. A general indorsement is one by which no indorsee is named.

8113. *Special indorsement, what.*

3113. A special indorsement specifies the indorsee.

8114. *General indorsement, how made special.*

3114. A negotiable instrument bearing a general indorsement cannot be afterwards specially indorsed; but any lawful holder may turn a general indorsement into a special one, by writing above it a direction for payment to a particular person.

8115. *Destruction of negotiability by indorser.*

3115. A special indorsement may, by express words for that purpose, but not otherwise, be so made as to render the instrument not negotiable.

8116. *Implied warranty of indorser.*

3116. Every indorser of a negotiable instrument, unless his indorsement is qualified, warrants to every subsequent holder thereof, who is not liable thereon to him:

1. That it is in all respects what it purports to be;
2. That he has good title to it;
3. That the signatures of all prior parties are binding upon them;
4. That if the instrument is dishonored, the indorser will, upon notice thereof duly given to him or without notice, where it is excused by law, pay the same with interest, unless exonerated under the provisions of sections 3189, 3213, 3248 or 3255.

8117. *Indorser, when liable to payee.*

3117. One who indorses a negotiable instrument before it is delivered to the payee, is liable to the payee thereon, as an indorser.

8118. *Indorsement without recourse.*

3118. An indorser may qualify his indorsement with the words, "without recourse," or equivalent words, and upon such indorsement

he is responsible only to the same extent as in the case of a transfer without indorsement.

8119. *Same.*

3119. Except as otherwise prescribed by the last section, an indorsement without recourse, has the same effect as any other indorsement.

8120. *Indorsee privy to contract.*

3120. An indorsee of a negotiable instrument has the same rights against every prior party thereto that he would have had if the contract had been made directly between them in the first instance.

8122. *Effect of want of consideration.*

3122. The want of consideration for the undertaking of a maker, acceptor or indorser of a negotiable instrument does not exonerate him from liability thereon to an indorser in good faith for a consideration.

8123. *Indorsee in due course, what.*

3123. An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer.

8124. *Rights of indorsee in due course.*

3124. An indorsee of a negotiable instrument, in due course, acquires an absolute title thereto, so that it is valid in his hands notwithstanding any provision of law making it generally void or voidable, and notwithstanding any defect in the title of the person from whom he acquired it.

8125. *Instrument left blank.*

3125. One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form.

ARTICLE IV.

PRESENTMENT FOR PAYMENT.

8130. *Effect of want of demand on principal debtor.*

3130. It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him; but if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part.

8131. *Presentment, how made.*

3131. Presentment of a negotiable instrument for payment, when necessary, must be as follows as nearly as by reasonable diligence it is practicable:

1. The instrument must be presented by the holder;
2. The instrument must be presented to the principal debtor, if he can be found at the place where presentment should be made; and if not, then it must be presented to some other person having charge thereof, or employed therein, if one can be found there;
3. An instrument which specifies a place for its payment, must be presented there; and if the place specified includes more than one house, then at the place of residence or business of the principal debtor, if it can be found therein;
4. An instrument which does not specify a place for its payment, must be presented at the place of residence or business of the principal debtor, or wherever he may be found, at the option of the presentor; and,
5. The instrument must be presented upon the day of its maturity, or, if it be payable on demand, it may be presented upon any day. It must be presented within reasonable hours; and, if it be payable at a banking house, within the usual banking hours of the vicinity, but, by the consent of the person to whom it should be presented, it may be presented at any hour of the day;
6. If the principal debtor have no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained presentment for payment is excused.

8132. *Apparent maturity, when.*

3132. The apparent maturity of a negotiable instrument, payable at a particular time, is the day on which, by its terms, it becomes due, or when that is a holiday, the next business day.

8133. *Presumption of dishonor of a bill payable after sight.*

3133. A bill of exchange, payable at a certain time after sight, which is not accepted within ten days after its date, in addition to the time which would suffice with ordinary diligence, to forward it for acceptance, is presumed to have been dishonored.

8134. *Apparent maturity of bill, payable at sight.*

3134. The apparent maturity of a bill of exchange, payable at sight or on demand, is:

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.

8135. *Apparent maturity of note.*

3135. The apparent maturity of a promissory note, payable at sight or on demand, is:

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, six months after date.

8136. *Same.*

3136. Where a promissory note is payable at a certain time after sight or demand, such time is to be added to the periods mentioned in the last section.

8137. *Surrender of instrument, when condition of payment.*

3137. A party to a negotiable instrument may require, as a condition concurrent to its payment by him:

1. That the instrument be surrendered to him, unless it is lost or destroyed, or the holder has other claims upon it; or,
2. If the holder has a right to retain the instrument and does retain it, then that a receipt for the amount paid, or an exoneration of the party paying, be written thereon; or,

3. If the instrument is lost or destroyed, then that the holder give to him a bond, executed by himself and two sufficient sureties, to indemnify him against any lawful claim thereon.

ARTICLE V.

DISHONOR OF NEGOTIABLE INSTRUMENTS.

8141. *Dishonor, what.*

3141. A negotiable instrument is dishonored when it is either not paid, or not accepted, according to its tenor, on presentment for that purpose, or without presentment where that is excused.

8142. *Notice, by whom given.*

3142. Notice of the dishonor of a negotiable instrument may be given:

1. By a holder thereof; or,
2. By any party to the instrument who might be compelled to pay it to the holder, and who would, upon taking it up, have a right to re-imbursement from the party to whom the notice is given.

8143. *Form of notice.*

3143. A notice of dishonor may be given in any form which describes the instrument with reasonable certainty, and substantially informs the party receiving it that the instrument has been dishonored.

8144. *Notice, how served.*

3144. A notice of dishonor may be given:

1. By delivering it to the party to be charged, personally, at any place; or,
2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or,
3. By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the post office most conveniently accessible

from the place where the presentment was made, and paying the postage thereon.

8145. *Notice, how served after indorser's death.*

3145. In case of the death of a party to whom notice of dishonor should otherwise be given, the notice must be given to one of his personal representatives; or, if there are none, then to any member of his family who resided with him at his death; or, if there be none, then it must be mailed to his last place of residence, as prescribed by subdivision 3 of the last section.

8146. *Notice given in ignorance of death, valid.*

3146. A notice of dishonor sent to a party after his death, but in ignorance thereof, and in good faith, is valid.

8147. *Notice, when to be given.*

3147. Notice of dishonor, when given by the holder of an instrument or his agent, otherwise than by mail, must be given on the day of dishonor, or on the next business day thereafter.

8148. *Notice of dishonor, when to be mailed.*

3148. When notice of dishonor is given by mail, it must be deposited in the post office in time for the first mail which closes after noon of the first business day succeeding the dishonor, and which leaves the place where the instrument was dishonored, for the place to which the notice should be sent.

8149. *Notice, how given by agent.*

3149. When the holder of a negotiable instrument at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser, and his principal may give notice to any other party to be charged, as if he were himself an indorser. And if an agent of the owner employs a sub-agent, it is sufficient for each successive agent or sub-agent to give notice in like manner to his own principal.

8150. *Additional time for notice by indorser.*

3150. Every party to a negotiable instrument, receiving notice of the dishonor, has the like time thereafter to give similar notice to prior parties as the original holder had after its dishonor. But this

additional time is available only to the particular party entitled thereto.

8151. *Effect of notice of dishonor.*

3151. A notice of the dishonor of a negotiable instrument, if valid in favor of the party giving it, inures to the benefit of all other parties thereto whose right to give the like notice has not then been lost.

ARTICLE VI.

EXCUSE OF PRESENTMENT AND NOTICE.

8155. *Notice of dishonor, when excused.*

3155. Notice of dishonor is excused:

1. When the party by whom it should be given cannot, with reasonable diligence, ascertain either the place of residence or business of the party to be charged; or,
2. When there is no post office communication between the town of the party by whom the notice should be given and the town in which the place of residence or business of the party to be charged is situated; or,
3. When the party to be charged is the same person who dishonors the instrument; or,
4. When the notice is waived by the party entitled thereto.

8156. *Presentment and notice, when excused.*

3156. Presentment and notice are excused as to any party to a negotiable instrument who informs the holder, within ten days before maturity, that it will be dishonored.

8157. *Same.*

3157. If, before or after maturity of an instrument, an indorser has received full security for the amount thereof, or the maker has assigned all his estate to him as such security, presentment and notice to him are excused.

8158. *Delay, when excused.*

3158. Delay in presentment, or in giving notice of dishonor, is excused when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence.

8159. *Waiver of presentment and notice.*

3159. A waiver of presentment waives notice of dishonor also, unless the contrary is expressly stipulated; but a waiver of notice does not waive presentment.

8160. *Waiver of protest.*

3160. A waiver of protest on any negotiable instrument other than a foreign bill of exchange waives presentment and notice.

ARTICLE VII.

EXTINCTION OF NEGOTIABLE INSTRUMENTS.

8164. *Obligation of party, when extinguished.*

3164. The obligation of a party to a negotiable instrument is extinguished:

1. In like manner with that of parties to contracts in general; or,
2. By payment of the amount due upon the instrument, at or after its maturity, in good faith and in the ordinary course of business, to any person having actual possession thereof, and entitled by its terms to payment.

CHAPTER II.

BILLS OF EXCHANGE.

ARTICLE I.

FORM AND INTERPRETATION OF A BILL.

8171. *Bill of exchange, what.*

3171. A bill of exchange is an instrument, negotiable in form, by which one, who is called the drawer, requests another, called the drawee, to pay a specified sum of money.

8172. *Drawee, in case of need.*

3172. A bill of exchange may give the name of any person in addition to the drawee, to be resorted to in case of need.

8173. *Bill in parts of a set.*

3173. A bill of exchange may be drawn in any number of parts, each part stating the existence of the others, and all forming one set.

8174. *When must be in a set.*

3174. An agreement to draw a bill of exchange binds the drawer to execute it in three parts, if the other party to the agreement desires it.

8175. *Presentment, etc., of part of set.*

3175. Presentment, acceptance, or payment, of a single part in a set of a bill of exchange, is sufficient for the whole.

8176. *Bill, where payable.*

3176. A bill of exchange is payable:

1. At the place where, by its terms, it is made payable; or,
2. If it specify no place of payment, then at the place to which it is addressed; or,
3. If it be not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found. If the drawee has no place of business, or if his place of business or residence [cannot] with reasonable diligence be ascertained, presentment for payment is excused, and the bill may be protested for nonpayment.

8177. *Rights and obligations of drawer.*

3177. The rights and obligations of the drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument.

ARTICLE II.

DAYS OF GRACE.

8181. *Days of grace.*

3181. Days of grace are not allowed.

ARTICLE III.

PRESENTMENT FOR ACCEPTANCE.

8185. *When a bill may be presented.*

3185. At any time before a bill of exchange is payable, the holder may present it to the drawee for acceptance, and if acceptance is refused, the bill is dishonored.

8186. *Presentment for acceptance, how made.*

3186. Presentment for acceptance must be made in the following manner, as nearly as by reasonable diligence it is practicable:

1. The bill must be presented by the holder or his agent;
2. It must be presented on a business day, and within reasonable hours;
3. It must be presented to the drawee, or, if he be absent from his place of residence or business, to some person having charge thereof, or employed therein; and,
4. The drawee on such presentment may postpone his acceptance or refusal until the next day. If the drawee have no place of business, or if his place of business or residence cannot with reasonable diligence be ascertained, presentment for acceptance is excused, and the bill may be protested for non-acceptance.

8187. *Presentment to joint drawees.*

3187. Presentment for acceptance to one of several joint drawees, and refusal by him, dispenses with presentment to the others.

8188. *When presentment to be made to drawee in case of need.*

3188. A bill of exchange which specifies a drawee in case of need, must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored.

8189. *Presentment, when must be made.*

3189. When a bill of exchange is payable at a specified time after sight, the drawer and indorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice, with ordinary diligence, to forward it for acceptance, unless presentment is excused.

ARTICLE IV.

ACCEPTANCE.

8193. *Acceptance, how made.*

3193. An acceptance of a bill must be made in writing, by the drawee or by an acceptor for honor, and may be made by the acceptor writing his name across the face of the bill with or without other words.

8194. *Holder entitled to acceptance on face of bill.*

3194. The holder of a bill of exchange, if entitled to an acceptance thereof, may treat the bill as dishonored if the drawee refuses to write across its face an unqualified acceptance.

8195. *What acceptance sufficient with consent of holder.*

3195. The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance:

1. An acceptance written upon any part of the bill, or upon a separate paper;
2. An acceptance qualified so far only as to make the bill payable at a particular place within the city or town in which, if the acceptance was unqualified, it would be payable; or
3. A refusal by the drawee to return the bill to the holder after presentment, in which case the bill is payable immediately, without regard to its terms.

8196. *Acceptance by separate instrument.*

3196. The acceptance of a bill of exchange, by a separate instrument, binds the acceptor to one, who, upon the faith thereof, has the bill for value or other good consideration.

8197. *Promise to accept, when equivalent to acceptance.*

3197. An unconditional promise, in writing, to accept a bill of exchange, is a sufficient acceptance thereof, in favor of every person who upon the faith thereof has taken the bill for value or other good consideration.

8198. *Cancellation of acceptance.*

3198. The acceptor of a bill of exchange may cancel his acceptance at any time before delivering the bill to the holder, and before the holder has, with the consent of the acceptor, transferred his title to another person who has given value for it upon the faith of such acceptance.

8199. *What acceptance admits.*

3199. The acceptance of a bill of exchange admits the signature of the drawer, but does not admit the signature of any indorser to be genuine.

ARTICLE V.

ACCEPTANCE OR PAYMENT FOR HONOR.

8203. *When bill may be accepted or paid for honor.*

3203. On the dishonor of a bill of exchange by the drawee, and, in case of a foreign bill, after it has been duly protested, it may be accepted or paid by any person, for the honor of any party thereto.

8204. *Holder of bill of exchange bound to accept payment for honor.*

3204. The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor.

8205. *Acceptance for honor, how made.*

3205. An acceptor or payor for honor must write a memorandum upon the bill, stating therein for whose honor he accepts or pays, and must give notice to such parties, with reasonable diligence, of the fact of such acceptance or payment. Having done so, he is entitled to re-imbursement from such parties, and from all parties prior to them.

8206. *How enforced.*

3206. A bill of exchange which has been accepted for honor must be presented at its maturity to the drawee for payment, and notice of its dishonor by him must be given to the acceptor for honor, in like manner as to an indorser; after which the acceptor for honor must pay the bill.

8207. *Notice of dishonor not excused by acceptance for honor.*

3207. The acceptance of a bill of exchange for honor does not excuse the holder from giving notice of its dishonor by the drawee.

ARTICLE VI.

PRESENTMENT FOR PAYMENT.

8211. *Presentment, when bill not accepted, where made.*

3211. If a bill of exchange is by its terms payable at a particular place, and is not accepted on presentment, it must be presented at the same place for payment, when presentment for payment is necessary.

8212. *Presentment of bill, payable at a particular place.*

3212. A bill of exchange, accepted at a particular place, must be presented at that place for payment, when presentment for payment is necessary, and need not be presented elsewhere.

8213. *Effect of delay in presentment, in certain cases.*

3213. If a bill of exchange, payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused.

8214. *Effect in other cases.*

3214. Mere delay in presenting a bill of exchange payable with interest, at sight or on demand, does not exonerate any party thereto.

ARTICLE VII.

EXCUSE OF PRESENTMENT AND NOTICE.

8218. *Presentment, when excused.*

3218. The presentment of a bill of exchange for acceptance is excused if the drawee has not capacity to accept it.

8219. *Delay, when excused.*

3219. Delay in the presentment of a bill of exchange for acceptance is excused when caused by circumstances over which the holder has no control.

8220. *Presentment and notice, when excused.*

3220. Presentment of a bill of exchange for acceptance or payment, and notice of its dishonor, are excused as to the drawer, if he

forbids the drawee to accept, or the acceptor to pay the bill; or if, at the time of the drawing, he had no reason to believe that the drawee would accept or pay the same.

ARTICLE VIII.

FOREIGN BILLS.

8224. *Definitions.*

3224. An inland bill of exchange is one drawn and payable within this state. All others are foreign.

8225. *Protest necessary.*

3225. Notice of the dishonor of a foreign bill of exchange can be given only by notice of its protest.

8226. *Protest, by whom made.*

3226. Protest must be made by a notary public, if with reasonable diligence one can be obtained; and if not, then by any reputable person, in the presence of two witnesses.

8227. *Protest, how made.*

3227. Protest must be made by an instrument in writing, giving a literal copy of the bill of exchange, with all that is written thereon, or annexing the original; stating the presentment, and the manner in which it was made; the presence or absence of the drawee or acceptor, as the case may be; the refusal to accept or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason assigned, if any; and, finally, protesting against all the parties to be charged.

8228. *Protest, where made.*

3228. A protest for non-acceptance must be made in the city or town in which the bill is presented for acceptance, and a protest for non-payment in the city or town in which it is presented for payment.

8229. *Protest, when to be made.*

3229. A protest must be noted on the day of presentment, or on the next business day; but it may be written out at any time thereafter.

8230. *Protest, when excused.*

3230. The want of a protest of a foreign bill of exchange, or delay in making the same, is excused in like cases with the want or delay of presentment.

8231. *Notice of protest, how given.*

3231. Notice of protest must be given in the same manner as notice of dishonor, except that it may be given by the notary who makes the protest.

8232. *Waiver of protest.*

3232. If a foreign bill of exchange on its face waives protest, notice of dishonor may be given to any party thereto, in like manner as of an inland bill; except that if any indorser of such a bill expressly requires protest to be made, by a direction written on the bill at or before his indorsement, protest must be made, and notice thereof given to him and all subsequent indorsers.

8233. *Declaration before payment for honor.*

3233. One who pays a foreign bill of exchange for honor must declare, before payment, in the presence of a person authorized to make protest, for whose honor he pays the same, in order to entitle him to re-imburement.

8234. *Damages allowed on dishonor of foreign bill.*

3234. Damages are allowed as hereinafter prescribed, as a full compensation for interest accrued before notice of dishonor, re-exchange, expenses, and all other damages, in favor of holders for value only, upon bills of exchange drawn or negotiated within this state, and protested for non-acceptance or non-payment.

8235. *Rate of damages.*

3235. Damages are allowed under the last section upon bills drawn upon any person:

1. If drawn upon any person in this state, two dollars upon each one hundred dollars of the principal sum specified in the bill;
2. If drawn upon any person out of this state, but in any of the other states west of the Rocky Mountains, five dollars

upon each hundred dollars of the principal sum specified in the bill;

3. If drawn upon any person in any of the United States east of the Rocky Mountains, ten dollars upon each hundred dollars of the principal sum specified in the bill;
4. If drawn upon any person in any place in a foreign country, fifteen dollars upon each hundred dollars of the principal sum specified in the bill.

8236. *Interest on account of protested bill.*

3236. From the time of notice of dishonor and demand of payment, lawful interest must be allowed upon the aggregate amount of the principal sum specified in the bill, and the damages mentioned in the preceding section.

8237. *Damages, how estimated.*

3237. If the amount of the protested bill of exchange is expressed in money of the United States, damages are estimated upon such amount without regard to the rate of exchange.

8238. *Same.*

3238. If the amount of a protested bill of exchange is expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest, in the place nearest to the place where the bill was negotiated, and where such bills are currently sold.

CHAPTER III.

PROMISSORY NOTES.

8244. *Promissory note, what.*

3244. A promissory note is an instrument, negotiable in form, whereby the signer promises to pay a specified sum of money.

8245. *Certain instruments promissory notes.*

3245. An instrument in the form of a bill of exchange, but drawn upon and accepted by the drawer himself, is to be deemed a promissory note.

8246. *Bill of exchange, when converted into a note.*

3246. A bill of exchange, if accepted with the consent of the owner, by a person other than the drawee, or an acceptor for honor, becomes in effect the promissory note of such person, and all prior parties thereto are exonerated.

8247. *Certain sections applicable to note.*

3247. Chapter I. of this title, and sections 3181 and 3214 of this Code, apply to promissory notes.

8248. *Effect of delay in presentment.*

3248. If a promissory note, payable on demand, or at sight, without interest, is not duly presented for payment within six months from its date, the indorsers thereof are exonerated, unless such presentment is excused.

CHAPTER IV.

CHECKS.

8254. *Check, what.*

3254. A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand without interest.

8255. *Rules applicable to checks.*

3255. A check is subject to all the provisions of this Code concerning bills of exchange, except that:

1. The drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby;
2. An indorsee, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period.

CHAPTER V.**BONDS, BANK NOTES, AND CERTIFICATES OF DEPOSIT.**

8261. *Bank note negotiable after payment.*

3261. A bank note remains negotiable even after it has been paid by the maker.

* * * * *

CHAPTER II.**TITLE VI.**

7021. *Collecting agent.*

2021. An agent employed to collect a negotiable instrument must collect it promptly, and take all measures necessary to charge the parties thereto, in case of its dishonor; and if it is a bill of exchange, must present it for acceptance with reasonable diligence.

B. POLITICAL CODE.

795. *Prima facie evidence of facts stated.*

795. The protest of a notary, under his hand and official seal, of a bill of exchange, or promissory note, for non-acceptance, or non-payment, stating the presentment for acceptance or payment, and the non-acceptance or non-payment thereof, the service of notice on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to such bill of exchange or promissory note and of the party to whom the same was given, and the post office nearest thereto, is prima facie evidence of the facts contained therein.

C. CODE OF CIVIL PROCEDURE.

10368. *Assignment of thing in action not to prejudice defense.*

368. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity.

* * * * *

10383. *Plaintiff may sue in one action the different parties to commercial paper.*

383. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

* * * * *

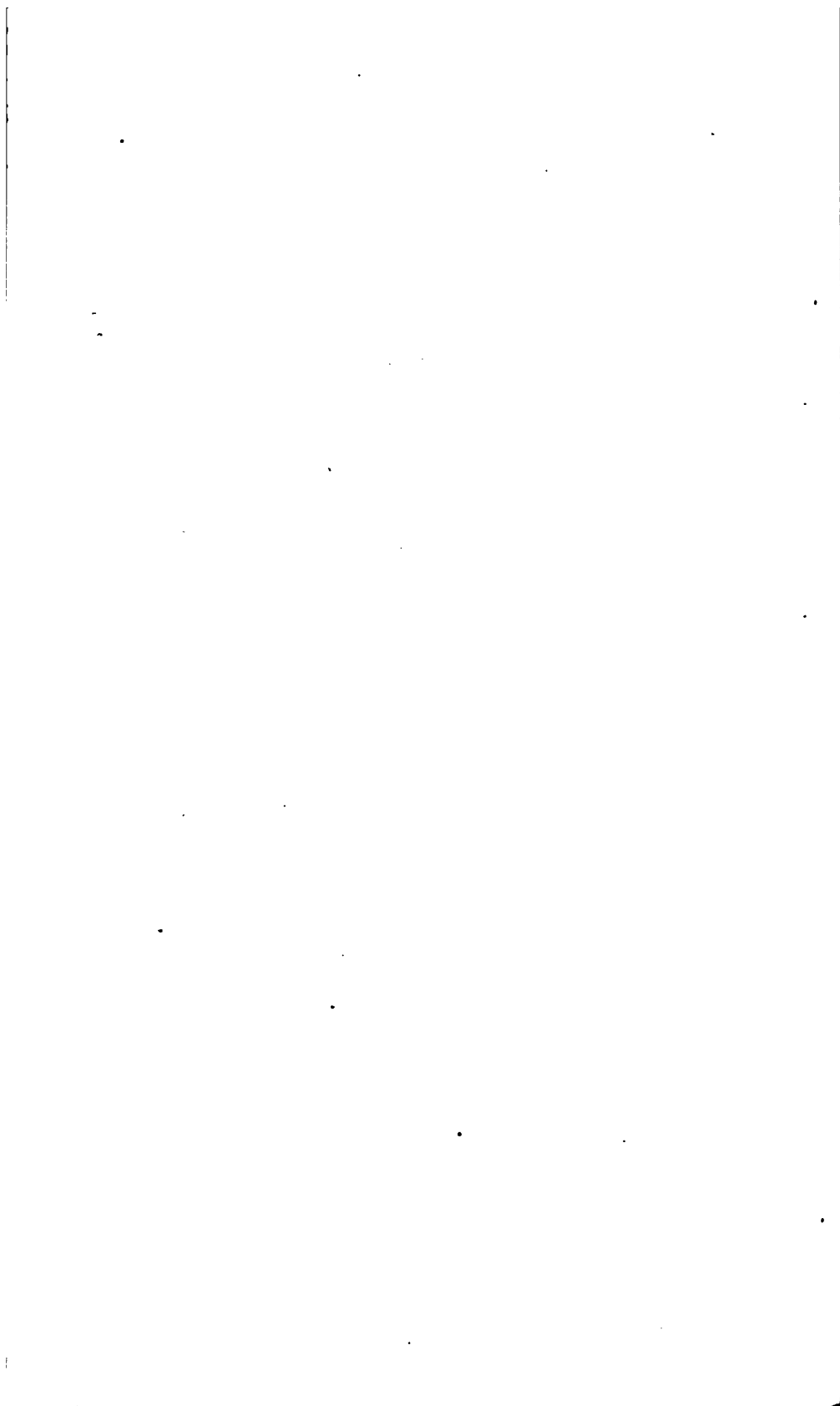
11865. *Written instrument construed as understood by parties.*

1865. A written notice, as well as every other writing, is to be construed according to the ordinary acceptance of its terms. Thus a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment and the same refused, and that the holder looks for payment to the person to whom the notice is given.

APPENDIX II.

FOREIGN STATUTES.

- I. BRITISH STATUTES.
- II. GERMAN EXCHANGE LAW.
- III. SPANISH CODE.
- IV. FRENCH CODE.



I. BRITISH STATUTES.

BILLS OF EXCHANGE ACT. 1882.

An Act to Codify the Law Relating to Bills of Exchange, Cheques and Promissory Notes.

[45 and 46 Vict. Ch. 61; 18th August, 1882.]

Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

PART I.

PRELIMINARY.

Short title.

1. This act may be cited as the bills of exchange act, 1882.

Interpretation of terms.

2. In this act, unless the context otherwise requires—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claims and set-off.

“Banker” includes a body of persons, whether incorporated or not, who carry on the business of banking.

“Bankrupt” includes any person whose estate is vested in a trustee or assignee, under the law for the time being in force relating to bankruptcy.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Issue" means the first delivery of a bill or note, complete in form to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

PART II.

BILLS OF EXCHANGE.

FORM AND INTERPRETATION.

Bill of exchange defined.

3. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to re-imburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.

(4) A bill is not invalid by reason—

(a) That it is not dated;

(b) That it does not specify the value given, or that any value has been given therefor;

(c) That it does not specify the place where it is drawn or the place where it is payable.

Inland and foreign bills.

4. (1) An inland bill is a bill which is, or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands, upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of her majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

Effect where different parties to bill are the same person.

5. (1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

Address to drawee.

6. (1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

(2) A bill may be addressed to two or more drawees, whether they are partners or not, but an order addressed to two drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange.

Certainty required as to payee.

7. (1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

(3) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

What bills are negotiable.

8. (1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

(2) A negotiable bill may be payable either to order or to bearer.

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order, at his option.

Sum payable.

9. (1) The sum payable by a bill is a sum certain within the meaning of this act, although it is required to be paid—

(a) With interest.

(b) By stated installments.

(c) By stated installments, with a provision that upon default in payment of any installment the whole shall become due.

(d) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill.

(2) Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

Bill payable on demand.

10. (1) A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight or on presentation; or

(b) In which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

Bill payable at a future time.

11. A bill is payable at a determinable future time within the meaning of this act, which is expressed to be payable—

(1) At a fixed period after date or sight.

(2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

Omission of date in bill payable after date.

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

Ante-dating and post-dating.

13. (1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

Computation of time of payment.

14. Where a bill is not payable on demand the day on which it falls due is determined as follows:

(1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of pay-

ment as fixed by the bill, and the bill is due and payable on the last day of grace:

Provided that—

- (a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;

34 and 35 Vict. c. 17.

- (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the bank holidays act, 1871, and acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

(2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

- (4) The term "month" in a bill means calendar month.

Case of need.

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need, or not, as he may think fit.

Optional stipulations by drawer or indorser.

16. The drawer of a bill, and any indorser, may insert therein an express stipulation—

- (1) Negativating or limiting his own liability to the holder;
- (2) Waiving as regards himself some or all of the holder's duties.

Definition and requisites of acceptance.

17. (1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2) An acceptance is invalid unless it complies with the following conditions, namely:

(a) It must be written on the bill and be signed by the drawee.

The mere signature of the drawee without additional words is sufficient.

(b) It must not express that the drawee will perform his promise by any other means than the payment of money.

Time for acceptance.

18. A bill may be accepted—

(1) Before it has been signed by the drawer, or while otherwise incomplete:

(2) When it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment:

(3) When a bill payable after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

General and qualified acceptances.

19. (1) An acceptance is either (a) general or (b) qualified.

(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

(a) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated:

(b) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn:

(c) Local, that is to say, an acceptance to pay only at a particular specified place:

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere:

(d) Qualified as to time:

(e) The acceptance of some one or more of the drawees, but not of all.

Inchoate instruments.

20. (1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

Delivery.

21. (1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(a) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

- (b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3) Where a bill is no longer in the possession of a party who signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

CAPACITY AND AUTHORITY OF PARTIES.

Capacity of parties.

22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Signature essential to liability.

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such:

Provided that

(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

Forged or unauthorised signature.

24. Subject to the provisions of this act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a

discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall effect the ratification of an unauthorised signature not amounting to a forgery.

Procuration signatures.

25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

Person signing as agent or in representative capacity.

26. (1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.

THE CONSIDERATION FOR A BILL.

Value and holder for value.

27. (1) Valuable consideration for a bill may be constituted by,—

- (a) Any consideration sufficient to support a simple contract;
- (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3) Where the holder of a bill has a lien on it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

Accommodation bill or party.

28. (1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser without receiving value therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

Holder in due course.

29. (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact:

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Presumption of value and good faith.

30. (1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.

(2) Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the

alleged fraud or illegality, value has in good faith been given for the bill.

NEGOTIATION OF BILLS.

Neglected of bill.

31. (1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiable by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Requisites of a valid indorsement.

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely,—

(1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a “copy” of a bill issued or negotiated in a country where “copies” are recognised, is deemed to be written on the bill itself.

(2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally does not operate as a negotiation of the bill.

(3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.

(4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.

(5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

(6) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

Conditional indorsement.

33. Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

Indorsement in blank and special indorsement.

34. (1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3) The provisions of this act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

Restrictive indorsement.

35. (1) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of H.," or "Pay D. or order for collection."

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorises him to do so.

(3) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

Negotiation of overdue or dishonored bill.

36. (1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise.

(2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes, of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

(5) Where a bill which is not overdue has been dishonored any person who takes it with notice of the dishonor takes it subject to any defect of title attaching thereto at the time of dishonor, but nothing in this sub-section shall affect the rights of a holder in due course.

Negotiation of bill to party already liable thereon.

37. Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

Rights of the holder.

38. The rights and powers of the holder of a bill are as follows:

(1) He may sue on the bill in his own name.

(2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

(3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

GENERAL DUTIES OF THE HOLDER.

When presentment for acceptance is necessary.

39. (1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

Time for presenting bill payable after sight.

40. (1) Subject to the provisions of this act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(2) If he do not do so, the drawer and all the indorsers prior to that holder are discharged.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

Rules as to presentment for acceptance, and excuses for non-presentment.

41. (1) A bill is duly presented for acceptance which is presented in accordance with the following rules:

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all,

unless one has authority to accept for all, then presentment may be made to him only:

- (c) Where the drawee is dead presentment may be made to his personal representative:
 - (d) Where the drawee is bankrupt presentment may be made to him or his trustee:
 - (e) Where authorized by agreement or usage, a presentment through the post office is sufficient.
- (2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonored by non-acceptance—
- (a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill:
 - (b) Where, after the exercise of reasonable diligence, such presentment cannot be effected:
 - (c) Where, although the presentment has been irregular, acceptance has been refused on some other ground.
- (3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment.

Non-acceptance.

42. (1) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonored by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

Dishonor for non-acceptance and its consequences.

43. (1) A bill is dishonored by non-acceptance—
- (a) When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or
 - (b) When presentment for acceptance is excused and the bill is not accepted.
- (2) Subject to the provisions of this act, when a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

Duties as to qualified acceptances.

44. (1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonored by non-acceptance.

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.

Rules as to presentment for payment.

45. Subject to the provisions of this act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

A bill is duly presented for payment which is presented in accordance with the following rules:—

(1) Where the bill is not payable on demand, presentment must be made on the day it falls due.

(2) Where the bill is payable on demand, then, subject to the provisions of this act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

(3) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

(4) A bill is presented at the proper place:—

- (a) Where a place of payment is specified in the bill and the bill is there presented.
- (b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.
- (c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.
- (d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

(5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

(6) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence can be found.

(8) Where authorised by agreement or usage a presentment through the post office is sufficient.

Excuses for delay or non-presentment for payment.

46. (1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

(2) Presentment for payment is dispensed with,—

- (a) Where, after the exercise of reasonable diligence presentment, as required by this act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for presentment.

- (b) Where the drawee is a fictitious person.
- (c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.
- (d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.
- (e) By waiver of presentment, express or implied.

Dishonor by non-payment.

47. (1) A bill is dishonored by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this act, when a bill is dishonored by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

Notice of dishonor and effect of non-notice.

48. Subject to the provisions of this act when a bill has been dishonored by non-acceptance or by non-payment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged;

Provided that—

(1) Where a bill is dishonored by non-acceptance, and notice of dishonor is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

(2) Where a bill is dishonored by non-acceptance, and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonor by non-payment unless the bill shall in the meantime have been accepted.

Rules as to notice of dishonor.

49. Notice of dishonor in order to be valid and effectual must be given in accordance with the following rules:—

(1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2) Notice of dishonor may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.

(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonored by non-acceptance or non-payment.

(6) The return of a dishonored bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonor.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8) Where notice of dishonor is required to be given to any person it may be given either to the party himself, or to his agent in that behalf.

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12) The notice may be given as soon as the bill is dishonored and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(a) Where the person giving and the person to receive notice reside in the same place, and notice is given or sent off in

time to reach the latter on the day after the dishonor of the bill.

- (b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonor of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

(13) Where a bill when dishonored is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14) Where a party to a bill receives due notice of dishonor, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonor.

(15) Where a notice of dishonor is duly addressed and posted, the sender is deemed to have given due notice of dishonor, notwithstanding any miscarriage by the post office.

Excuses for non-notice and delay.

50. (1) Delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

- (2) Notice of dishonor is dispensed with—

- (a) When, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged:
- (b) By waiver express or implied. Notice of dishonor may be waived before the time of giving notice has arrived, or after the omission to give due notice:
- (c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the

drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment:

- (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

Noting or protest of bill.

51. (1) Where an inland bill has been dishonored it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2) Where a foreign bill, appearing on the face of it to be such, has been dishonored by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonored by non-acceptance, is dishonored by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonor is unnecessary.

(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4) Subject to the provisions of this act, when a bill is noted or protested, it must be noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6) A bill must be protested at the place where it is dishonored:

Provided that—

- (a) When a bill is presented through the post office, and returned by post dishonored, it may be protested at the place to which it is returned and on the day of its

return if received during business hours, and if not received during business hours, then not later than the next business day:

- (b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.
- (7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—
- (a) The person at whose request the bill is presented:
 - (b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.
- (8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.
- (9) Protest is dispensed with by any circumstance which would dispense with notice of dishonor. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Duties of holder as regards drawee or acceptor.

52. (1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonor should be given to him.

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

LIABILITIES OF PARTIES.

Funds in hands of drawee.

53. (1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder, from the time when the bill is presented to the drawee.

Liability of acceptor.

54. The acceptor of a bill, by accepting it—

(1) Engages that he will pay it according to the tenor of his acceptance;

(2) Is precluded from denying to a holder in due course:

- (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;
- (b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;
- (c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

Liability of drawer or indorser.

55. (1) The drawer of a bill by drawing it—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonored he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonor be duly taken;
- (b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

- (2) The indorser of a bill by indorsing it—
- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonored he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonor be duly taken;
 - (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
 - (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto,

Stranger signing bill liable as indorser.

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

Measure of damages against parties to dishonored bill.

57. Where a bill is dishonored, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

- (a) The amount of the bill;
 - (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;
 - (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2) In the case of a bill which has been dishonored abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3) Where by this act interest may be recovered as damages, such

interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper,

Transferor by delivery and transferee.

58. (1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery."

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

DISCHARGE OF BILL.

Payment in due course.

59. (1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

Banker paying demand draft whereon indorsement is forged.

60. Where a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

Acceptor the holder at maturity.

61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

Express waiver.

62. (1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

Cancellation.

63. (1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

Alteration of bill.

64. (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

ACCEPTANCE AND PAYMENT FOR HONOR.

Acceptance for honor supra protest.

65. (1) Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest, for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn.

(2) A bill may be accepted for honor for part only of the sum for which it is drawn,

(3) An acceptance for honor supra protest in order to be valid must—

(a) Be written on the bill, and indicate that it is an acceptance for honor:

(b) Be signed by the acceptor for honor.

(4) Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

(5) Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honor.

Liability of acceptor for honor.

66. (1) The acceptor for honor of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2) The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Presentment to acceptor for honor.

67. (1) Where a dishonored bill has been accepted for honor *supra* protest, or contains a reference in case of need, it must be protested for non-payment, before it is presented for payment to the acceptor for honor, or referee in case of need.

(2) Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honor is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4) When a bill of exchange is dishonored by the acceptor for honor it must be protested for non-payment by him.

Payment for honor supra protest.

68. (1) Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn.

(2) Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3) Payment for honor *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a no-

tarial act of honor which may be appended to the protest or form an extension of it.

(4) The notarial act of honor must be founded on a declaration made by the payer for honor, or his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays.

(5) Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honor he pays, and all parties liable to that party.

(6) The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honor in damages.

(7) Where the holder of a bill refuses to receive payment *supra* protest he shall lose his right of recourse against any party who would have been discharged by such payment.

LOST INSTRUMENTS.

Holder's right to duplicate of lost bill.

69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill he may be compelled to do so.

Action on lost bill.

70. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

BILL IN A SET.

Rules as to sets.

71. (1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

(2) Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if the said parts were separate bills.

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

CONFLICT OF LAWS.

Rules where laws conflict.

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:
 - (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purposes of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.
- (2) Subject to the provisions of this act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer, be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonor, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored.

(4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

PART III.

CHEQUES ON A BANKER.

Cheque defined.

73. A cheque is a bill of exchange drawn on a banker payable on demand.

Except as otherwise provided in this part, the provisions of this act applicable to a bill of exchange payable on demand, apply to a cheque.

Presentment of cheque for payment.

74. Subject to the provisions of this act—

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

Revocation of banker's authority.

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

(1) Countermand of payment:

(2) Notice of customer's death.

CROSSED CHEQUES.

General and special crossings defined.

76. (1) Where a cheque bears across its face an addition of (a) the words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or (b) two parallel transverse lines simply, either with or without the words "not negotiable"; that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

Crossing by drawer or after issue.

77. (1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

Crossing a material part of cheque.

78. A crossing authorised by this act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this act, to add to or alter the crossing.

Duties of banker as to crossed cheques.

79. (1) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not, at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this act, and of payment having

been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

Protection to banker and drawer where cheque is crossed.

80. Where the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

Effect of crossing on holder.

81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Protection to collecting banker.

82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

PART IV.

PROMISSORY NOTES.

Promissory note defined.

83. (1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time a sum certain in money, to, or to the order of, a specified person or to bearer.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

Delivery necessary.

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

Joint and several notes.

85. (1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

Note payable on demand.

86. (1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

Presentment of note for payment.

87. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an

indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

Liability of maker.

88. The maker of a promissory note by making it—

- (1) Engages that he will pay it according to its tenor;
- (2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

Application of Part II. to notes.

89. (1) Subject to the provisions in this part and except as by this section provided, the provisions of this act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to—

- (a) Presentment for acceptance;
- (b) Acceptance;
- (c) Acceptance supra protest;
- (d) Bills in a set.

(4) Where a foreign note is dishonored, protest thereof is unnecessary.

PART V.

SUPPLEMENTARY.

Good faith.

90. A thing is deemed to be done in good faith, within the meaning of this act, where it is in fact done honestly, whether it is done negligently or not.

Signature.

91. (1) Where, by this act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign

it with his own hand but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2) In the case of a corporation, where by this act any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

Computation of time.

92. Where, by this act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

"Non-business days" for the purposes of this act mean—

(a) Sunday, Good Friday, Christmas Day:

(b) A bank holiday under the bank holidays act, 1871, or acts amending it:

(c) A day appointed by royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

When noting equivalent to protest.

93. For the purposes of this act where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

Protest when notary not accessible.

94. Where a dishonored bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonored, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonor of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this act may be used with necessary modifications, and if used shall be sufficient.

Dividend warrants may be crossed.

95. The provisions of this act as to crossed cheques shall apply to a warrant for payment of dividend.

Repeal.

96. The enactments mentioned in the second schedule to this act are hereby repealed as from the commencement of this act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this act or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

Savings.

97. (1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this act contained.

(2) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(3) Nothing in this act or in any repeal effected thereby shall affect—

33 and 34 Vict. c. 97.

- (a) The provisions of the stamp act, 1870, or acts amending it or any law or enactment for the time being in force relating to the revenue:

25 and 26 Vict. c. 89.

- (b) The provisions of the companies act, 1862, or acts amending it or any act relating to joint stock banks or companies:
- (c) The provisions of any act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively:
- (d) The validity of any usage relating to dividend warrants, or the indorsements thereof.

Saving of summary diligence in Scotland.

98. Nothing in this act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

Construction with other acts, &c.

99. Where any act or document refers to any enactment repealed by this act the act or document shall be construed and shall operate as if it referred to the corresponding provisions of this act.

Parol evidence allowed in certain judicial proceedings in Scotland.

100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parol evidence: provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

SCHEDULES.

FIRST SCHEDULE.*Sec. 94.*

Form of protest which may be used when the services of a notary cannot be obtained.

Know all men that I, A. B. (householder), of in the county of , in the United Kingdom, at the request of C. D., there being no notary public available, did on the day of 188- at demand payment (or acceptance) of the bill of exchange hereunder written, from E. F., to which demand he made answer

(state answer, if any). Wherefore I now, in the presence of G. H. and J. K. do protest the said bill of exchange.

(Signed)

A. B.

G. H. }

J. K. } Witnesses.

N. B.—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

SECOND SCHEDULE.

Enactments Repealed.

[3 and 4 Anne, c. 8; 34 and 35 Vict. c. 74, repealed.]

An Act for Giving Like Remedy upon Promissory Notes as is Now Used upon Bills of Exchange, and for the Better Payment of Inland Bills of Exchange.

[3 and 4 Anne, c. 9, s. 1.]

“Whereas it hath been held, that notes in writing signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person, and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note should be assigned, signed, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note, against the person who first drew and signed the same:” therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted by the queen’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all notes in writing that, after the first day of May, in

the year of our Lord one thousand seven hundred and five, shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politic and corporate, his, her, or their servant or agent, as aforesaid, doth or shall promise to pay to any other person or persons, body politic and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable, and also every such note payable to any person or persons, body politic and corporate, his, her, or their order, shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such sum of money is or shall be, by such note, made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do upon an inland bill of exchange made or drawn according to the custom of merchants against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed the same; and that any person or persons, body politic and corporate, to whom such note that is payable to any person or persons, body politic and corporate, his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid, by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed such note, or against any of the persons that indorse the same, in like manner as in cases of inland bills of exchange. And, in every such action, the plaintiff or plaintiffs shall recover his, her, or their damages and costs of suit; and, if such plaintiff or plaintiffs shall be non-suited, or a verdict be given against him, her, or them, the defendant or the defendants shall recover his, her, or their costs against the plaintiff or plaintiffs; and every such plaintiff or plaintiffs, defendant or defendants, respectively recovering may sue out execution for such damages and costs, by *capias*, *fieri facias*, or *elegit*.

An Act to Facilitate the Remedies on Bills of Exchange and Promissory Notes by the Prevention of Frivolous or Fictitious Defences to Actions Thereon.

[18 and 19 Vict. c. 67. 23rd July, 1855.]

Whereas bona fide holders of dishonored bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes: Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

I. From and after the twenty-fourth day of October, one thousand eight hundred and fifty-five, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in Schedule A. to this act annexed, and indorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the court, or an order for leave to proceed, as provided by the common law procedure act, 1852, and a copy of the writ of summons and the indorsements thereon, in case the defendant shall not have obtained leave to appear and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in Schedule B. to this act annexed (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum indorsed on the writ together with interest, at the rate specified (if any), to the date of the judgment, and a sum for costs to be fixed by the masters of the superior courts or any three of them, subject to the approval of the judges thereof, or any eight of them (of whom the lord chief justices and the lord chief baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith.

II. A judge of any of the said courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit.

III. After judgment, the court or a judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just.

IV. In any proceedings under this act it shall be competent to the court or a judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the court, and further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof.

V. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this act for the recovery of the amount of such bill or note.

VI. The holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons, according to this act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs of summons had been issued.

VII. The provisions of the common law procedure act, 1852, and the common law procedure act, 1854, and all rules made under or by virtue of either of the said acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this act.

VIII. The provisions of this act shall apply, as near as may be, to the court of common pleas at Lancaster and the court of pleas at Durham, and the judges of such courts, being judges of one of the superior courts of common law at Westminster, shall have power to frame all rules and process necessary thereto.

IX. It shall be lawful for her majesty from time to time, by an order in council, to direct that all or any part of the provisions of this act shall apply to all or any court or courts of record in England and Wales, and within one month after such order shall have been made and published in the London Gazette such provisions shall extend and apply in manner directed by such order, and any such order may be, in like manner, from time to time altered and annulled; and in and by any such order her majesty may direct by whom any powers or duties incident to the provisions applied under this act shall and may be exercised with respect to matters in such court or courts, and may make any orders or regulations which may be deemed requisite for carrying into operation in such court or courts the provisions so applied.

X. Nothing in this act shall extend to Ireland or Scotland.

XI. In citing this act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Summary Procedure on Bills of Exchange Act, 1855."

SCHEDULES REFERRED TO IN THE FOREGOING ACT.

SCHEDULE (A.)

Victoria, by the Grace of God, &c.

To C. D., of , in the county of

We warn you, that unless within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the judges of the courts at Westminster to appear, and do within that time appear in our court of in an action at the suit of A. B., the said A. B. may proceed to judgment and execution.

Witness, &c.

Memorandum to be Subscribed on the Writ.

N. B.—This writ is to be served within six calendar months from the date hereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be Made on the Writ before Service Thereof.

This writ was issued by E. F., of _____, attorney for the plaintiff. Or, This writ was issued in person by A. B., who resides at [mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence].

Indorsement.

The plaintiff claims [_____ pounds principal and interest], or _____ pounds balance of principal and interest due to him as the payee [or indorsee] of a bill of exchange or promissory note, of which the following is a copy:—

[Here Copy Bill of Exchange or Promissory Note, and All Indorsements upon It.]

And if the amount thereof be paid to the plaintiff or his attorney within _____ days from the service hereof, further proceedings will be stayed.

Notice.

Take notice, That if the defendant do not obtain leave from one of the judges of the courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do within such time cause an appearance to be entered for him in the court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the sum above claimed, and the sum of _____ pounds for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the judge's chambers, Serjeants' Inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Indorsement to be Made on the Writ after Service Thereof.

This writ was served by X. Y. on L. M. (the defendant the
defendants), on *Monday*, the day of , 18 .

X. Y.

SCHEDULE (B.)

In the Queen's Bench.

On the day of , in the year of our Lord, 18 .
[*Day of signing judgment.*]

England (to wit). A. B. in his own person [or by his at-
torney] sued out a writ against C. D., indorsed as follows:—

[*Here Copy Indorsement of Plaintiff's Claim.*]

and the said C. D. has not appeared:

Therefore it is considered that the said A. B. recover against the
said C. D. pounds, together with pounds for costs of suit.

**An Act to Abolish Days of Grace in the Case of Bills of Exchange
and Promissory Notes Payable at Sight or on Presentation.**

[34 and 35 Vict. c. 74. 14th August, 1871.]

2. Every bill of exchange or promissory note, drawn after this act comes into operation, and purporting to be payable at sight or on presentation, shall bear the same stamp, and shall, for all purposes whatsoever, be deemed to be a bill of exchange or promissory note payable on demand, any law or custom to the contrary notwithstanding.

4. A bill of exchange purporting to be payable at sight and drawn at any time between the first day of January, one thousand eight hundred and seventy-one, and the day of the passing of this act, both inclusive, and stamped as a bill of exchange payable on demand, shall be admissible in evidence on payment of the difference between the amount of stamp duty paid on such bill and the amount which would have been payable if this act had not passed.

An Act to Amend the Law as to the Contracts of Infants.

[37 and 38 Vict. c. 62. 7th August, 1874.]

1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

An Act to Repeal the Laws Relating to Usury and to the Enrollment of Annuities.

[17 and 18 Vict. c. 90. 10th August, 1854.]

Whereas, It is expedient to repeal the laws at present in force relating to usury; be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

I. The several acts and parts of acts made in the parliaments of England and Scotland, Great Britain and Ireland, mentioned in the schedule hereto, and all existing laws against usury, shall be repealed.

II. Provided always that nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person in respect of any act done previously to the passing of this act.

An Act to Amend the Laws of England and Ireland Affecting Trade and Commerce.

[19 and 20 Vict. c. 97. 29th July, 1856.]

III. No special promise to be made by any person after the passing of this act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith or some other person by him thereunto lawfully authorised shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

IV. No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.

V. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-

surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

II. GERMAN STATUTES.

The General German Exchange Law, with the Nuremburg Supplements.

CHAPTER I.

CAPACITY.

Art. 1. Every one can draw a bill of exchange who can bind himself by contract.

Art. 2. The party who is liable upon a bill of exchange is responsible for the discharge of his obligation with both person and property. [Sup. No. 1], *The holder of the bill may take out execution at the same time against both the person and property of his debtor.* Arrest,* however, is not permitted in suits:

(1) Against the heirs of the party liable upon the bill.

(2) Upon contracts of exchange entered into for corporations or other artificial persons or joint stock companies, or in the business of persons incapable of managing their own affairs, by their representatives;

(3) Against women unless they are in trade or other business.

[Sup. No. 2], *Exemption from personal arrest may be allowed by state laws in actions upon bills:*

(a) *Against members of representative assemblies during the sessions of the same.*

(b) *Against officers and soldiers, judge advocates and surgeons and other military officials, while in active service.*

(c) *Against civil officials in active service.*

* The provisions as to arrest have been since repealed by the law of May 20, 1868.

- (d) *Against ordained ecclesiastics.*
- (e) *Against the captain and crew and all other persons employed on board of a ship, if the vessel is ready to sail.*
- (f) *When a commission in bankruptcy [konkurs] has issued against the property of the debtor, or he has made an assignment on account of prior obligations; and,*
- (g) *When the debtor has been imprisoned for at least one year on account of prior obligations to the same creditor that seeks the arrest; except so far as the said creditor can prove that the debtor has means of payment at his command.*

[All restrictions of the right to arrest on bills of exchange other persons than those above mentioned, so far as they are based on grounds of public law, are contained in special statutes.]

Art. 3. The fact that a bill of exchange bears the signatures of persons, who are either wholly or partially incapable of entering into a contract of exchange, does not affect the liability of the other parties to the bill.

CHAPTER II.

BILLS OF EXCHANGE.

I. REQUISITES OF A BILL OF EXCHANGE.

Art. 4. The essential requisites of a bill of exchange are:

- (1) A designation of it as a bill of exchange (Wechsel) contained in the bill itself; or if the bill is drawn in a foreign language a statement of similar import in that language;
- (2) A statement of the amount to be paid.
- (3) The name of the person or the firm to whom or to whose order it is to be paid.
- (4) A statement of the time at which it is to be paid: the time of payment [Sup. No. 3] *must be for the entire sum at once and can be fixed only: at a day certain; at sight or a certain time after the date of the bill; at a fair or market.*
- (5) The signature of the drawer by his name or that of his firm.
- (6) A statement of the place where, and day of the month and year when, drawn.
- (7) The name of the person who, or firm which, is to make payment.

(8) A statement of the place where payment is to be made; the place mentioned in connection with the name or the firm of the drawee is considered both as the place of payment of the bill, and the place of residence of the drawee, unless a particular place of payment is mentioned.

Art. 5. If the amount to be paid [Art. 4, No. 2,] is expressed in both words and figures and these do not correspond, the bill is valid for the amount expressed in words.

If the amount is expressed several times in words, or several times in figures, which do not correspond, the bill is valid for the smallest amount expressed.

Art. 6. The drawer may make himself the payee [Art. 4, No. 3].

In like manner the drawer may make himself the drawee [Art. 4, No. 7,] in case payment is to be made at a place other than that of drawing the bill.

Art. 7. A writing which lacks any one of the essential requisites [Art. 4] of a bill of exchange has no binding force as a bill of exchange. The legal contracts also [indorsement, acceptance, guaranty,] contained in such a writing have no effect as contracts of exchange.

[Sup. No. 4] *A promise in a bill of exchange to pay interest is to be regarded as not written.*

II. THE OBLIGATION OF THE DRAWER.

Art. 8. The drawer of a bill of exchange is liable for its acceptance and payment as such.

III. INDORSEMENT.

Art. 9. The payee may transfer the bill of exchange to another by indorsement (Giro); but if the drawer has in the bill restricted its transfer by the words "not to order" or an equivalent expression, the indorsement has no legal effect.

Art. 10. By indorsement all rights growing out of the bill are transferred to the indorsee, and among others the privilege of further indorsing.

And a bill of exchange may be lawfully indorsed to the drawer, drawee or acceptor, or to a prior indorser, and by such person further indorsed.

Art. 11. The indorsement must be written upon the bill or a copy of the same, or upon a sheet (allonge) attached to the bill or copy.

Art. 12. An indorsement is valid if the indorser writes merely his name or that of his firm upon the back of the bill or the copy, or upon the allonge (blank indorsement).

Art. 13. Every holder of a bill is authorized to fill up the blank indorsements upon it; but he can indorse the bill over without doing this.

Art. 14. The indorser is bound to every subsequent holder of the bill for its acceptance and payment according to its tenor.

If, however, he has added to his indorsement the notice "without recourse" ["ohne Gewährleistung," "ohne Obligo"] or an equivalent qualification, he is discharged from liability on his indorsement.

Art. 15. If in the indorsement further transfer is forbidden by the words "not to order" ["nicht an Ordre"] or an equivalent phrase, those who obtain the bill through the indorsee can have no recourse to the indorser.

Art. 16. If a bill of exchange is indorsed after the period for protest for non-payment has expired, the indorsee acquires the rights existing against the drawee by reason of any acceptance that may have been given and right to recourse against all persons who indorsed the bill after the expiration of said period.

But if before the indorsement the bill has already been protested for non-payment, the indorsee has only the rights of his indorser against the acceptor, the drawer, and all who indorsed the bill before protest.

In such case the indorser is not liable as indorser by the law merchant.

Art. 17. If there is added to the indorsement the phrase "for collection" ["zur Einkassierung," "in Prokura,"] or any other formula expressive of agency, the indorsement does not transfer the title to the bill, but it authorizes the indorsee to collect the bill, to protest it and give notice of non-payment to the party prior to his indorser, as well as to bring suit for the amount unpaid, and to receive the amount paid into court on the bill. Such an indorsee is also empowered to transfer his authority to another by a further indorsement for collection. On the other hand, he is not entitled to make a fur-

ther transfer by his own indorsement, even if the clause "or order" is added to the indorsement for collection.

IV. PRESENTMENT FOR ACCEPTANCE.

Art. 18. The holder of a bill is entitled to present it at once to the drawee for acceptance and in default of acceptance to have it protested.

[Sup. No. 5] *A contrary agreement has no legal effect.*

An exception is allowed only in the case of bills drawn payable during a fair- or market-time [Mess- or Marktwechsel] which may be presented for acceptance and protested for non-acceptance only at the time designated by law for presentment at the place of the fair or market.

Mere possession of a bill confers authority to present it and have it protested for non-acceptance.

Art. 19. The holder is required to present for acceptance only such bills as are drawn payable at a certain time after sight. Such bills must (under penalty of losing all claim upon the bill against indorsers and drawer) be presented for acceptance in accordance with the intent clearly expressed in the bill, and, in default of such expression, within two years after date.

If an indorser has added to his indorsement upon a bill of this kind the designation of a special period for making presentment, he is released from his liability upon the bill, if it is not presented for acceptance within this period.

Art. 20. If acceptance of a bill payable at a certain time after sight, is not obtainable, or the drawee refuses to date his acceptance, the holder must (under penalty of losing all claim against indorsers and drawer) establish a due presentment of the bill by a protest made within the period for presentment.

In this case the day of protest is considered the day of presentment.

If the protest is not made, the maturity of the bill, as against the acceptor who omits to date his acceptance, is reckoned from the last day of the period for presentment.

V. ACCEPTANCE.

Art. 21. The acceptance of a bill of exchange must be made in writing upon the bill.

Every declaration written upon the bill and signed by the drawee is equivalent to an absolute acceptance, except so far as it is explicitly therein stated either that the drawee will not accept at all, or that he will do so only under certain restrictions. In like manner, it is an absolute acceptance, if the drawee writes his name or that of his firm without further words upon the face of the bill.

An acceptance once given cannot be retracted.

Art. 22. The drawee can restrict his acceptance to a part of the sum mentioned in the bill.

If other restrictions are added to the acceptance, the bill will be regarded exactly as if acceptance were absolutely refused; but the acceptor is liable by the law merchant according to the tenor of his acceptance.

Art. 23. The drawee becomes by his acceptance liable by the law merchant to pay at maturity the sum for which he has accepted.

The drawee by his acceptance becomes liable to the drawer also upon the bill.

On the other hand the drawee has no claim by the law merchant upon the bill against the drawer.

Art. 24. If in the bill a place of payment is named different [Art. 4, No. 8.] from that of the drawee's residence [Domicilwechsel], so far as it is not stated in the bill by whom the payment is to be made, this must be indicated by the drawee upon the bill in his acceptance. If this is not done, it is implied that the drawee himself will make payment at the place of payment. The drawer of such a bill may in the bill require presentment for acceptance. The disregard of such direction will involve the loss of the right of recourse against drawer and indorsers.

VI. DEMAND OF SECURITY.

1. *For Non-Acceptance.*

Art. 25. If acceptance of a bill of exchange is either absolutely refused or given on condition or for a smaller amount, the indorsers

and drawer are commercially liable, upon protest for non-acceptance, to give sufficient security for payment at maturity of the amount named in the bill, or of the amount for which the bill was not accepted, as well as for re-imbursement of the costs incurred by non-acceptance.

These persons may, however, at their own expense, deposit the amount due in court or with any other tribunal or institution authorized to receive deposits.

Art. 26. The payee as well as every indorsee, on receiving protest for non-acceptance, is thereby authorized to demand security from the drawer and other prior parties, and to bring suit thereon as upon a bill of exchange.

The person making such demand is not herein restricted to the order of the indorsements and the choice once made. Production of the bill and proof that the party making the demand has himself given security to subsequent parties are not necessary.

Art. 27. The security given is available not only to the party demanding it, but also to all other parties to the bill subsequent to the giver, so far as they make demand upon him for security. Such persons are entitled to demand further security only in case they can establish an objection to the character or amount of the security offered.

Art. 28. The security given must be surrendered:

- (1) As soon as, in addition thereto, a full acceptance is obtained.
- (2) If action is not brought on the bill for payment within one year from the maturity of the bill against the person liable to suit and furnishing the security.
- (3) If the bill is paid or becomes of no effect.

2. For Insecurity of Acceptance.

Art. 29. If a bill of exchange has been accepted in whole or in part, security for such amount can only be demanded:

- (1) If the acceptor has gone into bankruptcy, or has merely suspended payment.
- (2) If after the delivery of the bill an execution against the property of the acceptor has been returned unsatisfied, or if an execution has issued against his person in satisfaction of a money contract. If in these cases security is not furnished by the acceptor, and protest

is made on this account against him, and if on notice of the protest acceptance cannot be obtained from the persons that may be named in the bill *au besoin*, the holder and every indorser may, upon delivery of the protest, demand security from the parties to the bill prior to himself [Art. 25-28].

The mere possession of the bill in the above cases, (1) and (2), gives full authority to demand security from the acceptor, and if it is not to be obtained, to have the bill protested. [Sup. No. 6], *The holder of the bill may also in the above cases, (1) and (2), demand security of the acceptor as by procedure on the bill.*

VII. PERFORMANCE OF THE CONTRACT OF EXCHANGE.

1. *Time of Payment.*

Art. 30. If in the bill a certain day is named for payment, the bill matures on that day. If the time for payment is set for the middle of a month, the bill is payable on the fifteenth of that month. [Sup. No. 7], *If payment is to be made at the beginning or the end of a month, the first or last day of the month is to be understood.*

Art. 31. A bill drawn at sight is payable on presentation.

Such a bill must (on pain of loss of recourse against the indorsers and drawer) be presented for payment as directed specially in the bill, and, in default of such special direction within two years from its date.

If on a bill of this kind an indorser has added to his indorsement a particular time for presentation, his liability upon the bill ceases if it is not presented within such time.

Art. 32. Bills which are payable at a certain time after sight or after date, become due as follows:

(1) If the period is expressed in days, on the last day of such period; and in reckoning the period, the day on which a bill payable after date is drawn, or on which one payable after sight is presented for acceptance, is not counted.

(2) If the time is expressed in weeks or months, or in a period embracing several months (a year, half year, quarter), on that day of the week or month of payment which by its name or number corresponds to the day of date or presentment; and if the day does not

occur in the month of payment, the bill matures on the last day of that month.

The expression "half month" will be considered equivalent to fifteen days.

If the bill is drawn at one or more whole months and a half month, the fifteen days are to be counted last.

Art. 33. Days of grace are not allowed.

Art. 34. If an inland bill is drawn in a country where time is reckoned according to the old style, and it is not noted thereon that the bill is dated according to the new style, or if it is dated according to both styles, the day of maturity will be reckoned from that day of the new style calendar corresponding to the day of its date expressed according to the old style.

Art. 35. Fair- or market-bills ["Mess." or "Markt-Wechsel"] are payable at the time appointed by the laws of the place of the fair or market, and in default of such regulation, on the day before the legal close of the fair or market.

If the fair or market lasts only one day, the bill matures on that day.

2. Payment.

Art. 36. The holder of an indorsed bill of exchange is shown to be the owner of the bill by a continuous series of indorsements coming down to himself. Accordingly the first indorsement must be signed with the name of the payee, and every subsequent indorsement with the name of that person whom the immediately preceding indorsement names as indorsee. If a further indorsement follows one in blank, it is understood that the last indorser obtained the bill through the blank indorsement.

Indorsements stricken out will, upon proof of authority to erase, be considered as never written.

The person paying is not bound to establish the genuineness of the indorsements.

Art. 37. If a bill is drawn in a kind of money not current at the place of payment, or in a conventional currency, the amount of the bill may be paid at maturity in local currency of equal value, provided the drawer has not by use of the word "effective" or similar expression explicitly required payment in the currency designated in the bill.

Art. 38. The holder of the bill cannot refuse to receive a partial payment offered to him, even when the bill has been accepted for its entire face.

Art. 39. The person liable on the bill is only bound to pay upon surrender of the receipted bill. If he makes a partial payment, he can only require that the payment be noted upon the bill, and a receipt be given him upon a copy.

Art. 40. If payment of the bill is not demanded at maturity, after the expiration of the period appointed for protest for non-payment, the acceptor is entitled to deposit the amount of the bill at the risk and cost of the holder in court, or in any other tribunal or institution authorized to receive deposits.

To summon the holder is not necessary.

VIII. RECOURSE UPON NON-PAYMENT.

Art. 41. In order to have legal recourse against drawer and indorsers upon non-payment it is necessary:

- (1) That the bill should have been presented for payment; and
- (2) That both the presentment and the non-payment be shown by a protest therefor made in due time.

Protest may be made on the day fixed for payment, but at the latest it must be made on the second business day after the bill is due.

Art. 42. The request that no protest be made ["ohne Protest;" "ohne Kosten"] is considered as a waiver of protest, but not as a waiver of the right to a prompt presentment.

The burden of proof is on the party making such request, if he calls the due presentment in question. Such request is no defense against the liability for costs of protest incurred.

Art. 43. Bills drawn upon a particular place [Domizilirte Wechsel] are to be presented at that place to the person named as payer, or if no such person is named, to the drawee himself; and if payment is refused, are to be protested there.

If due protest against the designated payer is neglected, the right to recourse upon the bill is lost, not only as against the drawer and indorsers, but also as against the acceptors.

Art. 44. Neither presentment at maturity nor protest is neces-

sary to the right of recovery against the acceptor, except in the case mentioned in Art. 43.

Art. 45. The holder of a bill of exchange protested for non-payment must notify the party immediately preceding him thereof in writing within two days after the day of the protest. It is sufficient, if within this time the written notice is placed in the post office. Every party receiving notice must within the same time after its receipt give notice to the party immediately preceding him.

The holder or indorsee who fails to give notice, or to give it to the party immediately preceding him, is liable to all prior parties, or to the intermediate ones whom he has omitted, for the damages arising out of such omission. He loses also his claim against the said parties for interest and costs, so that he can only demand of them the face of the bill.

Art. 46. In proving that written notice was given in due time to a prior party, a post office certificate is sufficient evidence that a letter was sent by the person interested to the one addressed on the day specified; provided that it be not shown that the letter which arrived was of another purport. So, too, the day of the reception of written notice can be proved by a post office certificate.

Art. 47. If an indorser has transferred the bill without adding the designation of his residence, the party immediately prior to him is to be notified of the non-payment.

Art. 48. Every person liable on the bill has the right to demand from the holder, on payment of the amount of the bill with interest and costs, a surrender to him of the receipted bill and of the protest for non-payment.

Art. 49. The holder of a bill protested for non-payment may institute suit upon the bill against all parties liable on it or only against some one or more of them, without thereby losing his right of action against the parties liable and not included in the suit. He is not bound to pursue the indorsers in their order.

Art. 50. The right of recourse of an indorser who has had a bill protested for non-payment, is limited to:

- (1) The unpaid amount of the bill together with six per cent. interest per annum from maturity.
- (2) The costs of protest and other disbursements.
- (3) A commission of one-third of one per cent.

If the person liable lives in another place than that of payment, the amounts above mentioned must be paid at the same rate of exchange as a sight bill drawn from the place of payment of the bill upon the place of residence of the person liable.

If no rate of exchange exists at the place of payment upon that place of residence, the rate will be taken upon that place which lies nearest such residence.

The rate of exchange, on request of the person liable, is to be established by a table of rates promulgated by public authority, or by the certificate of a sworn broker, or in default of these by the certificate of two merchants.

Art. 51. The indorser who has paid the bill or has received it as a remittance, is entitled to demand from a prior indorser, or from the drawer:

(1) The amount paid by or charged to him, with six per cent. interest per annum from the day of payment.

(2) The costs incurred by him.

(3) Damages of one-third of one per cent.

If the party liable lives in a different place, the amounts above mentioned must be paid at the same rate of exchange as a sight bill drawn from the holder's place of residence upon that of the party liable as aforesaid.

If at the holder's residence there exists no rate of exchange upon the residence of the party so liable, the rate upon that place will be taken, which lies nearest such residence.

As to proof of the rate of exchange the provisions of Art. 50 apply.

Art. 52. Under the provisions of Arts. 50 and 51, Nos. 1 and 3, in recourse to a foreign place higher rates which are lawful there may be allowed.

Art. 53. The party taking recourse may draw a bill of re-exchange for the amount of his demand upon the person liable to him.

In such case the demand includes the broker's commissions for negotiating the bill of re-exchange as well as all stamp duties thereon.

The bill of re-exchange must be payable immediately upon sight.

Art. 54. The person to whom recourse is thus had is only bound to make payment upon surrender of the original bill, the protest and a receipted account of the cost of recourse.

Art. 55. Every indorser who has paid a subsequent party may strike out his indorsement and those subsequent to it.

IX. INTERVENTION.

1. *Acceptance for Honor.*

Art. 56. If upon a bill protested for non-acceptance a drawee au besoin is designated at the place where the bill is payable, acceptance must be demanded of such person before security can be required.

Among several persons named au besoin, that one must be preferred by whose payment the greatest number of parties liable will be discharged.

Art. 57. The holder is not required to receive an acceptance for honor on the part of a person not named au besoin upon the bill.

Art. 58. The acceptor for honor must, on repayment of costs, surrender the protest for non-acceptance, and in an addendum thereto note the acceptance for honor.

Upon sending the protest he must give the person for whose honor he accepted notice of the intervention which has occurred; and this notice he must put into the post office with the protest within two days after the day of protest.

If he omits this, he is liable for the damages arising from the omission.

Art. 59. If the acceptor for honor has omitted to note in his acceptance for whose honor the acceptance is given, it will be for the honor of the drawer.

Art. 60. The acceptor for honor becomes liable by his acceptance as a party to the bill to all parties subsequent to the person for whose honor he accepted. This liability ceases, if the bill is not presented for payment to the acceptor for honor at the latest on the second business day after its maturity.

Art. 61. If the bill is taken up by a person named au besoin or other intervenor for honor, the holder, and parties subsequent to the one for whose honor the bill is accepted, have no right to demand security. But security may be given by the one for whose honor it has been accepted, and by the parties prior to him.

2. Payment for Honor.

Art. 62. If there is upon a bill which is dishonored by the drawee or on a copy of it a drawee au besoin or an acceptance for honor at the designated place of payment, the holder must at the latest on the second business day after maturity present the bill for payment to all the persons named au besoin and to the acceptor for honor, and must note the result in the protest for non-payment or in an addendum to it.

If he neglects this, he loses his right of recourse to the party by whom the reference in case of need is made, or to the party for whose honor the bill was accepted, and the parties subsequent to them.

If the holder refuses a payment for honor offered by any other intervenor, he loses his right of recourse to the parties subsequent to the person for whose honor payment was offered.

Art. 63. The bill and the protest for non-payment must be surrendered upon repayment of costs to the person paying the bill for honor.

By such payment he acquires the rights of the holder [Arts. 50 and 52] against the person for whose honor he has paid, the parties prior to him, and the acceptor.

Art. 64. Among several persons offering to pay the bill for honor, that one is to be preferred by whose payment the greatest number of persons liable on the bill will be discharged.

An intervenor, who pays the bill notwithstanding that it is evident from the bill or the protest that another, who should have been preferred to him by this rule, was ready to pay it, has no right of recourse to those indorsers who would have been discharged through the payment offered by such other person.

Art. 65. The acceptor for honor who does not make payment, because the drawee or another intervenor has paid, is entitled to recover from the person paying a commission of one-third of one per cent.

X. DUPLICATION OF BILLS.*1. Duplicate Bills of Exchange.*

Art. 66. The drawee of a bill is obliged to deliver to the payee on demand several duplicate parts of the bill. These must be noted in the bill as first, second, third, &c.; otherwise each part will be valid as an independent bill (*Sola-Wechsel*). An indorsee also may demand a duplicate of the bill. He must apply for this to the party immediately prior to himself; and he must in turn go back to the party preceding him until the demand is made of the drawer. Every indorsee may require of his predecessor that the prior indorsements be repeated upon the duplicate.

Art. 67. If one of several parts is paid, the others become of no effect.

But there remain liable upon the other parts:

(1) On their indorsements, the indorser who has indorsed several parts of the same bill to different persons, and all later indorsers whose signatures are found upon the parts not surrendered on payment of the original bill.

(2) On his acceptance, the acceptor who has accepted several parts of the same bill which are not surrendered on payment of the original bill.

Art. 68. Whoever has forwarded one of several parts of a bill for acceptance must note upon those remaining with whom the part forwarded by him for acceptance is to be found. The omission of this note however does not render the bill invalid.

The person intrusted with the part forwarded for acceptance is bound to deliver the same to whoever proves himself entitled to receive it as indorsee [Art. 36] or otherwise.

Art. 69. The holder of a duplicate which states in whose hands the part forwarded for acceptance is to be found cannot demand security for non-acceptance and have recourse for payment upon non-payment, until he shows by means of protest:

(1) That the part forwarded for acceptance has not been delivered to him by the person having charge of it; and

(2) That acceptance or payment has not been obtained upon the duplicate.

2. Copies of Bills.

Art. 70. Copies of bills of exchange must contain a transcript of the bill and of the indorsements and memoranda found thereon, with the statement "a copy as far as this," or a similar notice added.

It must be noted in the copy with whom the original of the bill forwarded for acceptance is to be found. The omission of this memorandum does not however deprive the indorsed copy of its force as an instrument of exchange.

Art. 71. Every original indorsement found upon a copy binds the indorsers exactly as if it stood upon an original bill.

Art. 72. The person in charge of the original bill is bound to deliver it to the holder of a copy containing one or more original indorsements, provided such person proves himself entitled to receive it as indorsee or otherwise.

If the original bill is not delivered up by its custodian, the holder of the copy may demand security (only after making the protest mentioned in Art. 69, No. 1), and payment (only after the day stated in the copy for the maturity of the bill) against those indorsers whose original indorsements are found upon the copy.

XI. LOST BILLS.

Art. 73. The owner of a lost bill of exchange may ask for the cancellation of the bill in the court of the place of payment. After commencing proceedings for cancellation, he may demand payment from the acceptor, if he gives security for the cancellation of the bill. Without giving such security he is only entitled to ask that the sum due upon the acceptance be paid into court, or into some other tribunal or institution authorized to receive deposits.

Art. 74. The owner of a bill, who is shown to be such in accordance with the provisions of Art. 36, may only be compelled to surrender it if he obtained the bill in bad faith, or was chargeable with gross negligence in obtaining it.

XII. FORGED BILLS.

Art. 75. Even if the signature of the drawer of a bill of exchange is spurious or counterfeit, the genuine acceptance and genuine indorsements remain in full force.

Art. 76. Upon a bill containing a spurious or counterfeit acceptance or indorsements, all the indorsers and the drawer whose signatures are genuine remain liable by the law merchant.

XIII. LIMITATIONS OF ACTIONS ON BILLS.

Art. 77. The right of action against the acceptor on the bill is barred in three years, reckoned from the day of the maturity of the bill.

Art. 78. The holder's [Art. 50] right of recourse to the drawer and other prior parties is barred:

(1) In three months, if the bill was payable in Europe, with the exception of Iceland and the Faroe Islands.

(2) In six months, if the bill was payable in the maritime countries of Asia and Africa, along the Mediterranean and Black Seas, or among the islands of those seas belonging to said countries.

(3) In eighteen months, if the bill was payable in other non-European countries or in Iceland or the Faroe Islands.

The period of limitation begins to run against the holder on the day of making protest.

Art. 79. The indorser's [Art. 5] right of recourse to his drawer and other prior parties is barred:

(1) In three months, if the person seeking recourse lives in Europe excepting Iceland and the Faroe Islands.

(2) In six months, if the person seeking recourse lives in the maritime countries of Asia and Africa, along the Mediterranean and Black Seas, or in the islands of those seas belonging to said countries.

(3) In eighteen months, if the person seeking recourse lives in any other non-European country, or in Iceland or the Faroe Islands.

The period of limitation runs against the indorser from the time of payment, if he has paid before an action is begun against him; but in all other cases from the day process is served on him.

Art. 80. The period of limitations [Arts. 77-79] is interrupted only by service of process, and only then in relation to the person against whom the process is directed. But in this respect notice by the defendant that the bill is contested is equivalent to the commencement of an action.

XIV. RIGHT OF ACTION.

Art. 81. The obligations arising under a bill of exchange affect the drawer, acceptor and indorsers of the bill and every one who has subscribed with them, the bill, the copy thereof, the acceptance or the indorsement, even if he has named himself therein as surety only (per aval).

The liability of these parties extends to all demands of the holder of the bill on account of non-performance of the contract of exchange.

The holder of the bill may for his whole demand confine himself to a single party; and he may elect which of the parties liable on the bill he will first hold.

Art. 82. The party liable on the bill can only avail himself of such defenses as arise under the law merchant or belong to him personally against the actual plaintiff.

Art. 83. If the drawer's or acceptor's liability is extinguished by lapse of time, or by neglect to take the steps prescribed by law for maintaining the holder's rights, such parties remain liable to the holder of the bill only so far as they would receive an advantage at his expense.

Against indorsers whose liability on the bill has been extinguished such a claim is not allowed.

XV. FOREIGN STATUTES.

Art. 84. The capacity of a foreigner to enter into the contract of exchange is decided by the laws of the state to which he belongs. Nevertheless a foreigner not capable by the laws of his own country becomes bound by assuming such obligations in this country, so far as he is capable according to the laws of this country.

Art. 85. The essential requisites of a bill drawn in a foreign country, as well as of every other contract upon a bill made in a foreign country, are determined by the laws of the place where the contract is made. But if the contracts on a bill made in a foreign country comply with the requirements of the law of this country, the objection that such contracts are defective according to foreign law cannot be urged against the validity of subsequent contracts indorsed on the bill in this country.

In like manner, contracts on bills, by which a citizen of this country becomes liable abroad to a fellow-citizen, are valid if they only comply with the legal requirements of this country.

Art. 86. The law of the forum regulates the form of proceedings in a foreign place for asserting or maintaining the holder's rights on the bill.

XVI. PROTEST.

Art. 87. Every protest must be made by a notary or magistrate.

There is no necessity for the presence of witnesses or of any one to make an official record.

Art. 88. The protest must contain:

(1) A literal transcript of the bill or copy, and of all indorsements and memoranda found thereon.

(2) The names or the firm name of the persons for whom and against whom the protest is made.

(3) The demand made of the persons against whom the bill is protested, their answer, or memorandum of the fact that they gave none, or could not be found.

(4) A statement of the place where, and of the day, month and year when, the demand [No. 3] was made or unsuccessfully attempted.

(5) In case of an acceptance or payment for honor, a statement by whom, for whom, and how it was offered and made.

(6) The signature of the notary or magistrate who took the protest, with the addition of his official seal.

Art. 89. If performance of anything required by the law merchant is to be demanded of several persons, the several demands require but one instrument of protest.

Art. 90. Notaries and magistrates are required to make entry day by day and in order of dates of the entire contents of the protests made by them in a special register having its pages numbered *seriatim*.

XVII. PLACE AND TIME FOR PRESENTMENT AND OTHER PROCEEDINGS RELATING TO BILLS.

Art. 91. Presentment for acceptance or payment, making protest, demand of a duplicate bill, and all other acts to be done in relation to a given party, must be done at his place of business, and in default of such place at his residence.

This can be done at any other place, e. g. the exchange, only by mutual agreement.

It is not to be assumed that the place of business or residence cannot be discovered until inquiry made by the notary or other officer of the local police has proved without result, and this fact must be noted in the protest.

Art. 92. If the bill falls due on a Sunday or public holiday, the next business day is the day of payment. The delivery also of a duplicate bill, the declaration as to acceptance, and every other act can only be required on a business day.

If the time for requiring performance of any of the above-mentioned acts falls upon a Sunday or public holiday, such act must be required on the next business day.

The same provision applies to the making of protest.

Art. 93. If at any place on which a bill is drawn general payment-days exist, a bill falling due between such days must be paid on the next succeeding payment-day, unless the bill is drawn at sight.

But the time limited in Art. 41 for making protest for non-payment cannot be exceeded.

XVIII. DEFECTIVE SIGNATURES.

Art. 94. Contracts on bills executed with a cross or other mark instead of a name are only valid if such marks have a judicial or notarial authentication.

Art. 95. Whoever signs a contract on a bill as the agent of another, without authority for that purpose, is personally liable in the same manner that the alleged principal would have been liable if he had conferred the authority. The same is true of guardians and other representatives, who enter into contracts of exchange in excess of their authority.

CHAPTER III.**PROMISSORY NOTES.**

Art. 96. The essential requisites of a promissory note are:

(1) The designation of it as an instrument of exchange contained in the note itself, or, if the note is drawn in a foreign language, an expression in the foreign language corresponding to such designation.

(2) The statement of the amount of money to be paid.

(3) The name of the person or the firm to whom or to whose order the maker will make payment.

(4) A specification of the time at which it will be paid [Art. 4, No. 4].

(5) The signature of the maker with his name or firm.

(6) A statement of the place, day of the month, and year of issue.

Art. 97. If a particular place of payment is not given, the place of making is considered as the place of payment and also as the maker's place of residence.

Art. 98. The following regulations, already provided in his act for bills of exchange, apply also to promissory notes:

(1) Articles 5 and 7, concerning the form of the bill.

(2) Articles 9-17, concerning indorsement.

(3) Articles 19 and 20, concerning presentment at a given time after sight; with the modification that presentment must be made to the maker.

(4) Article 29, concerning demand for security, with the modification that it is applicable in case of the bad credit of the maker.

(5) Articles 30-40, concerning payment and the privilege of depositing the amount of a matured bill, with the modification that the deposit may be made by the maker.

(6) Articles 41 and 42, as well as articles 45-55, concerning recourse to indorsers in default of payment.

(7) Articles 62-65, concerning payment for honor.

(8) Articles 70-72, concerning copies.

(9) Articles 73-76, concerning lost and forged bills, with the modification that in the case mentioned in Art. 73 payment must be sought from the maker.

(10) Articles 78-96, concerning the general principles of limitation upon bills, the limitation of actions in recourse against the indorsers, the right of action of the holder, foreign exchange laws, protest, place and time for presentment and other proceedings relating to bills, as well as concerning defective signatures.

Art. 99. Promissory notes drawn payable at a particular place, are to be presented for payment to the person referred to for payment at that place, or, if no such person is named, to the maker himself at the place where payment is promised, and if payment is not made, are to be there protested. If due protest against the designated payer at the place where the note is payable is omitted, the right of action upon the bill against the maker and indorsers is lost thereby. [Sup. No. 8], *Upon promissory notes not payable at a particular place, neither presentment upon the day of maturity nor protest is necessary for the maintenance of the holder's right of action against the maker.*

Art. 100. The right of action by the law merchant against the maker of a promissory note is barred in three years from the day of the maturity of the note.

III. SPANISH STATUTES.

The Spanish Commercial Code of 1829.

BOOK II.

Commercial Contracts in General, Their Form and Effect.

TITLE IX.

CONTRACT AND BILLS OF EXCHANGE.

Section I. FORM OF BILLS OF EXCHANGE.

Art. 426. Bills of exchange, in order to have the full effect given them by mercantile law, must contain all the following particulars:

1. Designation of place, day, month and year of giving the bill.
2. Time when it is to be paid.
3. Full name of the person to whose order it is to be paid.
4. Amount which the drawer orders to be paid, specified in actual money or in nominal currency recognized by commerce for exchange.
5. The consideration of the bill or the manner in which the drawer declares himself to have received it, specifying whether he received it in money or goods or whether it is value agreed on, or in account, with the payee.
6. The full name of the person from whom the consideration of the bill is received or to whose account it is to be charged.
7. The name and residence of the person on whom it is drawn.
8. The signature of the drawer with his own hand or that of some person duly authorized to sign in his name.

Art. 427. A notary public may act in the drawing up of the bill to authenticate the signature of the drawer.

Art. 428. The clauses "value on account" and "value agreed" render the payer liable according to the tenor of the bill in favor of the drawer to collect or pay in the manner and at the time agreed upon by both parties when the bill was drawn.

Art. 429. Bills of exchange payable at the place where they are drawn are forbidden. Such bills are to be considered mere notes by the drawer in favor of the payee. Any acceptance placed on them will have effect as a mere guaranty of the responsibility of the drawer and not otherwise.

Art. 430. The drawer of a bill may draw it to his own order for consideration expressly to be received by himself.

Art. 431. In like manner a bill may be drawn for account of one person payable at the residence of another.

Art. 432. In like manner a bill may be drawn in the drawer's own name to the order, and for the account, of another to be so expressed in the bill. But the liability of the drawer remains unchanged, and the holder acquires no right against the third person for whose account the bill was drawn.

Art. 433. Neither drawer nor payee can demand of the other that an alteration be made after delivery of the bill either in the amount to be paid, the place of payment, the designation of a person to make payment or other particular; and any such alteration can only be made by consent of both parties.

Art. 434. If the drawers or acceptors of a bill are not merchants, it will be considered as to them a mere note, the effects of which are to be determined by the ordinary laws of the courts of such party's residence, without prejudice to the right of the holder to demand its construction according to mercantile law wherever a merchant has become party to it.

But if such non-commercial party has drawn or accepted the bill for a consideration growing out of a mercantile transaction, he will be liable according to mercantile law and jurisdiction, so far as regards obligations contracted in the bill.

The indorsement, whether by a merchant or not, guarantees the consideration of the bill indorsed, reserving to non-commercial indorsers the jurisdiction of their own forum.

Art. 435. All who sign bills in the name of another must be specially authorized thereto by the person in whose name they act, and must express that fact in their signature. And the payees and holders of the bill may require the signer to produce his authority.

Art. 436. The drawer cannot refuse to the payee of a bill second, third and other parts, as many as may be demanded, of like tenor with the first, if demanded before maturity of the bill. The second and all subsequent parts must expressly provide that they are not to be valid except on failure to pay the first or other part that may be first forwarded.

Art. 437. Any holder of a bill may, on default of duplicate parts given by the drawer, himself give to his indorsee a copy of the original bill, in which all the indorsements contained in the bill must be literally copied, and it must be expressed that such copy is given for want of a second part.

Art. 438. If any formal requisite is wanting in a bill, it is to be considered as a note on the drawer's account in favor of the payee.

Section II. TERM AND MATURITY OF BILLS.

Art. 439. Bills may be drawn payable:

At sight or on demand;

At one or more days or months after sight;

At one or more days or months after date;

At one or more usances;

At a fixed day;

At a fair.

Art. 440. A bill payable at sight must be paid on presentment.

Art. 441. Bills drawn at certain days or months after sight run from the day following their acceptance or protest for non-acceptance.

Art. 442. Bills drawn at certain days or months after date or at one or more usances are reckoned from the day immediately following the day they are drawn.

Art. 443. The usance for inland bills is two months; for bills drawn in a foreign country on any place in Spain as follows:

In France, thirty days. In England, Holland or Germany, two months. In Italy or any foreign port of the Mediterranean or Adriatic, three months. As to places not included in the above schedule,

the usance will vary according to the form observed in the place of drawing.

Art. 444. For the computation of bills drawn payable in months or usances, the months are to be reckoned from date to date.

Art. 445. Bills drawn payable on a fixed day are to be paid on the day designated therefor.

Art. 446. Bills payable at a fair are due on the last day of the fair.

Art. 447. All bills payable at a designated time must be paid on the day of maturity before sunset, all local customs as to days of grace or indulgence being included in the repeal made by the general law in Art. 259.

[Article 259 reads as follows: Days of grace, courtesy, or other designation postponing the performance of mercantile obligations shall not be recognized unless stipulated by the parties in the contract or supported by an express provision of law.—Ed.]

Section III. THE DUTIES OF THE DRAWER.

Art. 448. The drawer is obliged to provide funds at the disposal of the person on whom he has drawn.

Art. 449. If the bill was drawn for account of a third person, it will be his duty to provide for it, but the drawer always remains directly liable to the holder of the bill.

Art. 450. It will be sufficient provision, if at the maturity of the bill the drawee is indebted to the drawer in a sum equivalent to the face of the bill.

Art. 451. The expense caused by non-acceptance or non-payment of the bill will be charged to the drawer or third person for whose account the bill is drawn, unless he shows that provision was made in due time, or that he was expressly authorized to draw for the amount in question by the person whose duty it was to accept or pay the bill. In either case the drawer may demand from the person failing to accept or pay the bill indemnity for the expenses paid by him on that account to the holder.

Art. 452. The drawer is liable for the bill to all persons successively acquiring it and transferring it up to the last holder. The effects of this liability in the cases of non-acceptance and non-payment respectively are stated in Arts. 465 and 534.

Art. 453. The liability of the drawer terminates when the holder

has failed to present or to protest the bill in due time and form, provided that he shows that at the maturity of the bill he had funds at the drawee's disposal for its payment.

Art. 454. If provision of funds is not shown as above required, the drawer will be liable for the payment of the dishonored bill, until it is outlawed, although protest was made after the time limited therefor by law.

Section IV. ACCEPTANCE AND ITS EFFECT.

Art. 455. The drawee of a bill of exchange, in whatever form it is expressed, is bound to accept it or to signify to the holder his reasons for refusal.

Art. 456. The acceptance of bills of exchange must be signed by the acceptor and expressed in the formula "I accept" or "We accept." Any other expression is without legal efficacy.

Art. 457. If the bill is drawn one or more days or months after sight, the acceptor must date his acceptance; and if he refuses so to do, the time will run from the day when the holder without delay in the mail might have presented the bill. If by this computation the bill is then due, it must be paid on the day after presentment.

Art. 458. If the bill is payable elsewhere than at the residence of the acceptor, the acceptance must designate the place of payment.

Art. 459. Bills cannot be accepted conditionally, but the acceptance may be limited to an amount less than the face of the bill; in which case it is to be protested for the amount not included in the acceptance.

Art. 460. Acceptance must be given or refused on the day on which the holder presents it for that purpose.

Art. 461. The person of whom acceptance is demanded cannot hold the bill under any pretext; and if it comes into his hands by consent of the holder and he allows the day to pass without returning it, he will be liable for its payment, although he does not accept it.

Art. 462. The acceptance of the bill renders the acceptor liable to pay it at maturity, and the fact that the drawer has provided no funds will not relieve him from such liability.

Art. 463. Against an acceptance made in due form and recognized as legal no release (restitucion) or other defense is admissible.

The acceptance will be invalid only when the bill is shown to be forged.

Art. 464. In case acceptance of the bill is refused, it must be protested for non-acceptance.

Art. 465. By virtue of the protest for non-acceptance the holder may demand of the drawer or of any indorser satisfactory security for the amount of the bill, or in default thereof a deposit or payment of the amount, with costs of protest and re-exchange less lawful discount of interest for the time the bill has yet to run.

Section V. INDORSEMENT AND ITS EFFECTS.

Art. 466. The ownership of bills of exchange is transferred by the indorsement of those who successively acquire it.

Art. 467. The indorsement must contain:

1. The full name of the person to whom the bill is transferred.
2. A statement whether the consideration is received in money or goods or is charged to account.
3. The full name of the person from whom it is received or to whom it is charged, unless it is the same person to whom the bill is transferred.
4. The date when it is made.
5. The signature of the indorser or of the duly authorized agent who signs for him. If the indorser does not sign for himself, his name must always be expressed in the signature.

Art. 468. If the consideration or date is not expressed in the indorsement, the title to the bill does not pass, but it amounts to a simple power to collect.

Art. 469. The indorsement will be void, if the person to whom the bill is transferred is not designated with certainty, or if the signature of the indorser or his lawful agent is wanting.

Art. 470. Antedating indorsements renders the person doing so liable for the damages that ensue therefrom to a third person, as well as personally liable for forgery if the act is done maliciously.

Art. 471. Indorsements cannot be made in blank, and one who has so indorsed will have no action against any one to recover the amount of the bill transferred in this manner.

Art. 472. Bills which are taken for the account or risk of another without guaranty from the person who undertakes such charge, should be transferred and indorsed for the use of the principal, value received from the agent.

Art. 473. The indorsement renders each and all of the indorsers liable to make good the amount of the bill, if it is not accepted, and to pay it with costs of protest and re-exchange, if not paid at maturity; provided that the diligence required by law has been observed in the time and form of demand and protest.

Art. 474. The indorsement of bills after dishonor produces no effect but an ordinary transfer, except so far as agreed in writing between the parties to the transfer as to their respective rights, without prejudice to the rights of third parties.

Section VI. GUARANTY AND ITS EFFECTS.

Art. 475. The payment of a bill may be guaranteed by a particular contract independent of that made by the acceptor and indorser, known as an aval.

Art. 476. The aval must be made in writing upon the bill or in a separate instrument.

Art. 477. The aval may be limited and the guaranty restricted to a specified time, event, amount or person. In such terms it will create no greater liability than the contracting party imposed on himself.

Art. 478. If the aval is in general terms and without restriction, he that gives it is liable for the payment of the bill in the same circumstances and manner as the person for whom he gives the guaranty.

Section VII. PRESENTMENT OF BILLS AND EFFECT OF THE HOLDER'S NEGLIGENCE.

Art. 479. The holder of a bill of exchange has a definite time to present it for acceptance and payment. This varies according to the manner in which the bill is drawn.

Art. 480. If the bill is drawn in the Peninsula or the Balearic Isles at a given time after sight on any place in the said Peninsula or Isles, it must be presented for acceptance within forty days after its date.

Bills drawn at sight must be presented for payment within the same period.

Art. 481. Bills drawn as in the foregoing article payable at a certain time from date need not be presented for acceptance, if the time designated does not exceed thirty days; but if it exceeds that time, acceptance must be made in thirty days.

Art. 482. The periods provided in the two foregoing articles are doubled for bills drawn between the Peninsula and the Canary Islands.

Art. 483. Bills drawn between the Peninsula and the Spanish Antilles or other place beyond seas and not beyond Cape Horn and Cape Good Hope must be presented for acceptance or payment within six months after their date, whatever may be the period designated in the instrument.

As to places beyond Cape Horn and Cape Good Hope the time shall be one year.

Art. 484. Holders of bills directed beyond seas must always forward duplicate parts at least by different vessels; and if it appear that the vessel by which the first or second part is forwarded has suffered disaster at sea, which has interrupted the voyage, the time before the accident becomes known in the place of the drawer's residence shall not be reckoned in the legal period for presentment.

The presumptive loss of vessels when no news has been received from them in the time prescribed by Art. 908 [i. e. one year.—Ed.] shall have the same effect.

Art. 485. Bills drawn in foreign countries on places in Spanish territory must be presented for payment or acceptance, in order to remain enforceable in Spanish courts, within the period provided in such countries, if payable after date, and if payable after sight, within forty days after their arrival in the kingdom.

Art. 486. Bills drawn in Spanish territory on foreign countries must be presented and protested according to the laws of the place where they are payable.

Art. 487. Payment of bills of exchange must be demanded by the holder on the day of maturity, and if that is a holiday, on the preceding day. On non-acceptance or non-payment of the bill the holder must see to its being protested within the time and in the manner specified in the section relating to protests.

Art. 488. If the holder of the bill lets the time pass which is prescribed for presentment for acceptance and protest for non-acceptance, he loses the right to demand of the drawer and indorsers the security, deposit or payment, for which they would be liable to him on protest for non-acceptance made in due time.

Art. 489. A bill which is not presented for payment on the day of payment and protested for non-payment on the day following, is prejudiced [*perjudicada*].

Art. 490. If the bill is prejudiced [*perjudicada*], the right of the holder against the indorsers is lost and their responsibility for its collection terminates.

As to the right of the holder of such a bill against the drawer, provisions will be found in Arts. 453 and 454.

Art. 491. In bills containing memoranda made by the drawer or indorser for application for acceptance or payment on default of acceptance or payment by the drawee, the holder of the bill must after protest demand acceptance or payment from the persons named in the memoranda, applying first to the person named by the drawer, then to the person named by the indorsers, following their order of indorsement.

Want of diligence herein renders the holder liable for all costs of protest and re-exchange, and prevents his recourse to the party making such designation, until he proves such diligence.

Art. 492. In bills forwarded from one place to another too late for due presentment and payment, the loss falls on the senders, the indorsers being simply agents for collection.

Art. 493. In order that the person, who takes a bill on his own account too late for acceptance within the time fixed by law, may retain his claim against the person transferring it, he must require of him a special promise to answer for the payment of the bill although presented and protested out of time.

Section VIII. PAYMENT.

Art. 494. Bills must be paid in the actual money designated, and if they are drawn payable in conventional currency, they will be reduced into the actual money of the country where they are payable, computed according to the usage and custom of the place.

Art. 495. He that pays a bill before it has become due is not dis-

RAND.C.P.—177

charged from his liability according to its tenor, if it appears that he has not paid the right person.

Art. 496. Payment made to the holder of a bill that is due is presumed to be valid, provided the amount of the bill has not been previously sequestrated by decree of a competent court.

Art. 497. The sequestration of a bill can only occur in cases of loss or theft of the bill or where the holder has become insolvent.

Art. 498. Whenever the payer is requested by any known person to hold back the amount of the bill for any of the causes stated in the preceding article, he should delay his payment for the remainder of the day of presentment, and if within the day he is not notified of a formal sequestration, he should pay it.

Art. 499. The holder of the bill who demands its payment is obliged, if required by the payer, to establish his personal identity by documentary evidence or by means of persons who know and will guarantee it.

Art. 500. Payments in advance of bills not yet due are valid, provided the payer does not become insolvent within fifteen days after the advance payment is made.

If this occurs, the holder of the bill must pay into the general fund the amount received from the insolvent, and the bill will be returned to him in order that he may avail himself of his rights under it.

Art. 501. The holder of a bill is in no case obliged to receive the amount before it is due.

Art. 502. By consent of the holder and not otherwise, a part of the bill may be paid and the balance left outstanding. When this occurs, the bill must be protested for the amount which remains to be paid, and the holder will retain it in his control, noting on it the amount received and giving a separate receipt for it.

Art. 503. He that pays a bill, which has been accepted on another part than that which is paid, remains liable for the amount of the bill to a third party who has become the lawful holder of the acceptance.

Art. 504. The acceptor of a bill, who is required to pay another part than that which he has accepted, is not obliged to comply, unless the holder gives him satisfactory security for the amount of the bill. But if he refuses payment notwithstanding security is given him, protest

is to be made for non-payment. This security is canceled by law, when the acceptance which gave occasion to it has become outlawed without any claim having been presented.

Art. 505. Bills which are not accepted may be paid after they have matured, and not before, on the second, third or other part which may have been forwarded as prescribed by Art. 436.

Art. 506. Payment cannot be lawfully made on the copies furnished by the indorsers under the provision in Art. 437, unless the holder produces also one of the parts delivered by the drawer.

Art. 507. One who has lost a bill, whether accepted or not, and has no other part whereof to demand payment, can only require of the payer to deposit the amount of the bill in the general bureau of deposits, if there is one, or with some person convenient to both or designated by the judge of first instance in the case of disagreement. And if the payer does not consent to make the deposit, this refusal must be certified by protest made with the same solemnities as protest for non-payment; and by this proceeding the claimant will preserve his rights against those who may be liable for the payment of the bill.

Art. 508. If the lost bill was drawn out of the kingdom or beyond seas, and the holder proves his property by his books and the correspondence of the person from whom he obtained the bill, or by the certificate of the broker who transacted the business, he will have the right to have the amount paid him on making this proof and giving proper security, which shall remain in force until production of the duplicate of the bill delivered by the same drawer.

Art. 509. The demand of a copy to be substituted for a lost bill should be made by the last holder from the person transferring it to him, and so successively by each indorser from his indorser back to the drawer.

No one can refuse his name and services in furnishing the duplicate, the owner of the lost bill paying the expenses caused in obtaining it.

Art. 510. Payments made on account of a bill by the drawee reduce to that extent the liability of the drawer and indorsers.

Section IX. PROTEST.

Art. 511. Bills of exchange are protested for non-acceptance or for non-payment.

Art. 512. Protests for non-acceptance must be made on the day

after presentment of the bill. If the day on which protest should be made is a holiday, it will be made on the day following.

Art. 513. Every protest, whether for non-acceptance or non-payment, must be made before a public or royal notary and two resident witnesses who are not table-companions or servants of the acting notary.

Art. 514. The protest proceedings must be had personally with the drawee and at the place of residence where he undertakes to transact said business, if he can be found there. In case he cannot be found, then with his business employés, if any, and for want of them, with his wife, children or servants, leaving at the time a copy of the said protest with the said persons on pain of nullity.

Art. 515. The legal residence for the protest proceedings is:

1. That designated in the bill.
2. If none is designated, the payer's actual residence.
3. In default of both, his last known residence.

If the payer's residence is not ascertained in any of the three ways aforesaid, the local municipal authority is to be inquired of, and the protest proceedings had with the person exercising such authority, and the copy delivered to him in default of the whereabouts of the payer being ascertained.

Art. 516. After protest is made against the direct payer of the bill, recourse must be had to those who are indicated secondarily, if there are such.

Art. 517. The protest should contain an exact copy of the bill with the acceptance, if any, and all the indorsements and memoranda made on it. Then must follow the demand made of the person who should accept or pay the bill, or in his absence, of the person acting in his name, and his reply must be recited literally.

It must conclude with notice of the costs and damages charged to the said person on account of the non-acceptance or non-payment.

It must be signed by the person against whom it is made; and if he does not know how to write or cannot, by two witnesses who were present at the proceeding.

In the date of the protest mention must be made of the hour when it was done.

Art. 518. Every protest is invalid which does not conform to the requirements of the foregoing articles.

Art. 519. If the bill which is protested contains references in case of need, the replies of the persons referred to in answer to the demand made of them, and the acceptance or payment, if given, must be set out in the protest.

Art. 520. All protest proceedings on a bill must be set forth in one protest in regular order and in the order in which they took place, and the notary must furnish an attested copy to the holder of the bill on returning the original bill to him.

Art. 521. Protest must be made before three o'clock in the afternoon, and the notary shall retain the bill in his control without delivering it or the certificate of protest to the holder until sunset of the day it was made; and if in the meantime the payer presents himself to make payment of the amount of the bill and the costs of protest, the notary shall receive the payment, delivering the bill to him and canceling the protest.

Art. 522. No act or document can supply the omission and want of protest so as to preserve the rights of the holder against the persons liable for the payment of the bill, except in case of the statement in lieu of protest for non-payment when the bill is lost.

Art. 523. The holder is not relieved from the necessity of protest for non-acceptance or non-payment either by the insolvency or insolvent condition of the drawee.

Art. 524. Protest for non-acceptance does not relieve the holder of the bill from the duty of protesting it anew, if it is not paid.

Art. 525. The bill may be protested for non-payment before it becomes due, if the payer becomes insolvent. When this occurs, the holder may at once assert his rights against those who are liable for the payment of the bill.

Section X. INTERVENTION IN ACCEPTANCE AND PAYMENT.

Art. 526. When a bill is protested for non-acceptance or non-payment, intervention will be allowed by a third person who offers to accept or pay it for account of the drawer or of any indorser; although he may have received no previous authority to do so.

Art. 527. Intervention in acceptance or payment is to be set out in a continuation of the protest under the signature of the intervenor and the notary, with a statement of the name of the person for whose honor the intervention is made.

Art. 528. The acceptor of a bill for honor is liable to pay it as if the bill had been drawn on him, and must give notice of his acceptance by the next mail to the person for whose honor he intervened.

Art. 529. Acceptance for honor does not prevent the holder of the bill from demanding security for its payment from the drawer or indorsers.

Art. 530. If the person who has refused to accept a bill, and who has occasioned its protest for non-acceptance, offers to pay it at its maturity, he will be allowed to pay it in preference to the acceptor for honor and to every person who may offer to pay it for honor. But he will be obliged to pay also the costs occasioned by his not having accepted the bill at the proper time.

Art. 531. One who pays a bill for honor is subrogated to the rights of the holder, provided that he meets the obligations incumbent on the holder and with the following limitations:

If he pays for the honor of the drawer, only the drawer will be liable to him for repayment of the amount and all the indorsers will be discharged.

If he pays for an indorser, he has the same right of recourse against the drawer as well as against the indorser for whose honor he intervened, and those preceding him in the order of their indorsements; but not against subsequent indorsers, who are discharged from liability.

Art. 532. One who pays a prejudiced (*perjudicada*) bill for honor has no greater right of action than the holder would have against a drawer who has not made provision of funds in due time.

Art. 533. If several persons intervene at once for the payment of a bill, the one who intervenes for the honor of the drawer will be preferred; and if all intervene for the honor of indorsers, the one intervening for the honor of the indorser of oldest date will be preferred.

Section XI. ACTIONS AVAILABLE TO THE HOLDER OF A BILL OF EXCHANGE.

Art. 534. In default of payment of a bill of exchange, presented and protested in due time and form, the holder may demand reimbursement with costs of protest and re-exchange, from the drawer,

indorsers and acceptors, provided they are all liable for the payment of the bill.

Art. 535. The holder may direct his action against that one of the drawer, indorsers or acceptors that may suit him best; but if he has once commenced action against one, he cannot proceed against the others, except in case of the insolvency of the one first sued.

Art. 536. When the holder of a protested bill has directed his action against the acceptor rather than the drawer and indorsers, he must cause notice to be sent to all of them by a public or royal notary within the time fixed in Arts. 480-483 for demanding acceptance.

The indorsers who have been omitted in such notice are discharged from liability for payment of the bill, although the acceptor prove insolvent; so, too, the drawer who can prove that he made due provision of funds.

Art. 537. If, after execution made against the goods of the debtor for the payment of a bill, the holder has been able to obtain only a part of the amount due him, he may bring his action against the others successively for what remains to be paid, until he is entirely reimbursed.

Art. 538. If an indorser who is sued for the payment of a bill becomes insolvent, the holder may proceed against the others who are liable on the bill; and if all become insolvent, he may recover from the estate of each a dividend corresponding to the amount due him, until the entire amount is paid.

Art. 539. If a bill protested for non-payment is taken up by an indorser, he is subrogated to all the rights of the holder against the drawer, the prior indorsers and the acceptor.

Art. 540. The indorser who takes up a bill for non-acceptance can only demand of the drawer or prior indorsers security for the amount of the bill or a deposit for want of security.

Art. 541. A bill, which has been prejudiced (*perjudicada*) for want of demand, protest and notice within the time required by law, will not lose its force as against a drawer or indorser who has been indemnified after such lapse of time in his accounts with his debtor or by money or goods belonging to him.

Art. 542. Both the drawer and the indorsers of a protested bill, may, as soon as they receive notice of protest, demand that the

holder receive the amount with lawful costs and deliver the bill with the protest and account of re-exchange.

In a competition between drawer and indorsers, the drawer will be preferred, and after him the indorsers in the order of their priority.

Art. 543. Bills of exchange are subject to a summary proceeding for execution (*accion ejecutiva*) requiring severally of the drawer, acceptors and indorsers payment, re-imbursement, deposit and security of the amount.

Art. 544. The execution will be issued on production of the bill and protest, without further requirement than that the drawer or indorser, who is sued for payment, should make judicial acknowledgment of his signature. With respect to the acceptor, who at the time of the protest of the bill has made no charge of forgery against the acceptance, judicial acknowledgment is unnecessary, and execution will be decreed at once on production of the accepted bill and the protest showing its non-payment.

Art. 545. No defenses will be admitted against the summary proceeding for execution on bills of exchange, except forgery, payment, satisfaction in account (*compensacion de credito liquido y ejecutivo*), prescription or nullity of the bill, and extension or release by the plaintiff, which must be proved by public record, or a private instrument, acknowledged before a judge. Any other defense to which the defendant is entitled must be reserved for ordinary adjudication, and cannot be set up against the summary action for execution, which must proceed in due course until the holder of the bill is satisfied.

Art. 546. Without the consent of the holder the court cannot extend the time for performance of the obligations contracted in bills of exchange.

Art. 547. The amount released or discharged by the creditor to the debtor, against whom he proceeds for payment or reimbursement of a bill of exchange, is released also to the other parties who may be liable for the bill.

Art. 548. Bills of exchange protested for non-payment draw interest for their face from the day of protest in favor of unpaid holders.

Section XII. RE-EXCHANGE AND REDRAWING.

Art. 549. The holder of a protested bill of exchange may draw a new bill against the drawer, or one of the indorsers, to re-imburse himself for the amount of the bill and expenses of protest and re-exchange.

Art. 550. The drawer of the re-exchange must annex to it the original protested bill, with proof of protest, and account of re-exchange.

Art. 551. Only the following items may be included in the account of re-exchange:

The amount of the protested bill, the costs of protest, the stamp duty for the new bill, the commissions fixed by local custom, the brokerage fees for negotiating it, the postage, the damages suffered in the re-exchange.

Art. 552. In the account of re-exchange must be mentioned the name of the person on whom the new bill is drawn, its amount and the exchange at which it was negotiated.

Art. 553. The re-exchange must conform to the current rate obtaining at the place of drawing on the place where it is to be paid, to be established in the account of such re-exchange by the certificate of an exchange broker, or, where there is none, of two merchants.

Art. 554. Several accounts of re-exchange cannot be made on one bill, but the first is to be paid by one indorser after another, until finally extinguished by payment on the part of the drawer.

Art. 555. In like manner, several bills of re-exchange cannot be accumulated, but each indorser like the drawer will be liable on one, which will be regulated, as to the drawer, by the rate of exchange current at the place of payment on the place of his drawing; and, as to the indorsers, by the rate ruling in the place of their respective indorsements on the place where the re-imbursement is furnished.

Art. 556. The holder of a bill of re-exchange can only demand interest on its amount from the day when he commences action against the person from whom he is entitled to recover.

Art. 557. All actions on bills of exchange are extinguished in four years from their maturity, if no proceeding is begun on them before that time, whether the bill is protested or not.

TITLE X.**DRAFTS AND NOTES PAYABLE TO ORDER.**

Art. 558. Drafts to order between merchants, and notes or due bills to order based on commercial operations, shall have the same force and effect as bills of exchange, except as to acceptance, and subject to the restrictions provided in Art. 567.

Art. 559. Drafts are always payable on demand, although not expressed, unless they designate a particular time, in which case they will be due at that time.

Art. 560. The holder cannot demand acceptance of time drafts or have recourse against the drawer or indorser until they are protested for non-payment.

Art. 561. Notes or due bills to order are payable ten days from date, if no time of payment is designated. If designated, they are due on that day without grace, indulgence or usance.

The designated time runs from the day after the date and is reckoned as in bills of exchange.

Art. 562. The same formalities which are required of the holder of a bill in suing the payer or indorser for re-imbursement, are prescribed for the holders of drafts and notes or due bills to order.

Art. 563. Drafts and notes or due bills to order must contain: the date, the amount, the time of payment, the person to whose order payment is to be made, the place where it is to be made, the origin and character of the consideration represented, the signature of the drawer or maker.

Notes which are to be paid in a place other than the maker's residence must indicate a place of payment.

Drafts must further contain the expression that they are drafts, and also the name and residence of the person on whom they are drawn.

Art. 564. Indorsements of drafts and notes are to be made in the same form as in bills of exchange.

Art. 565. The holder of a note cannot refuse to receive amounts offered on account by the debtor at the time of its maturity; and any amount received then or prior thereto must be indorsed on the

note and will discharge to that extent all the indorsers. But protest must not on that account be omitted, in order to maintain the right of action against them for the balance.

Art. 566. Summary proceedings for execution cannot be had on notes and drafts, except after the defendant has judicially acknowledged his signature.

Art. 567. Holders of drafts protested for non-payment must seek recourse against the drawer and indorsers within two months after date of protest, if the draft was payable in Spanish territory; and if payable abroad, the time will be reckoned from the time when, without loss of mail, the protest could reach the residence of the drawer or indorser, to whom recourse is had.

After the lapse of this time the liability of the indorsers is at an end, as well as that of a drawer who shows that at the maturity of the draft he had provided funds in the hands of the persons whose duty it was to pay it.

Art. 568. The provision of the former article is applicable to the indorsers of notes or due bills to order, whose liability will be at an end after two months from date of protest, leaving to the holder his remedy only against the person immediately liable on the note.

Art. 569. No suit can be brought for the payment or re-imbursement of drafts and commercial notes more than four years after their maturity.

Art. 570. Drafts or notes which are not drawn to order are not commercial contracts but simple promises to pay subject to the ordinary law of loan contracts.

Art. 571. Notes payable to bearer without certain designation of any person are not the subject either of ordinary or commercial actions.

TITLE XI.

LETTERS OF CREDIT.

Art. 572. Letters of credit, to be considered commercial contracts, must be given by one merchant to another in carrying out a mercantile transaction.

Art. 573. Letters of credit cannot be made to order without specifying a particular payee. In making use of it the holder must prove his identity, if not personally known to the payer.

Art. 574. Every letter of credit must be drawn for a fixed sum as a maximum to be paid the holder; and such as have not this requisite are simple letters of recommendation.

Art. 575. The giver of a letter of credit is liable to the person on whom it is given for the amount he may pay upon it, not exceeding that named in the letter.

Art. 576. A letter of credit cannot be protested nor can the holder have any action on it against the drawer, although it be not paid.

But if it appear that the drawer revoked it at an unreasonable time, and fraudulently, in order to hinder the business of the payee, he will be liable to him for the damages consequent thereon.

Art. 577. If there occurs reasonable cause which has weakened the credit of the payee of a letter of credit, the drawer may cancel it and give notice of countermand to the drawee without incurring liability thereby.

Art. 578. The holder of a letter of credit must without delay reimburse the drawer the amount received upon the letter, if he has not before placed it in the drawer's hands; and on his failure to do so, the drawer may demand it by summary proceeding, with lawful interest on the debt from the day of demand and the exchange current between the place of payment and the place of re-imbursement.

Art. 579. When the holder of a letter of credit has made no use of it within the time agreed, or, if no time is expressed, within such time as a judge of first instance may under the circumstances consider sufficient, he must return it to the drawer on request or give security for the amount of it until the drawee receives notice of its revocation.

TITLE XII.

GENERAL PROVISIONS AS TO PRESCRIPTION OF COMMERCIAL CONTRACTS.

Art. 580. All the periods fixed by special provisions of this Code for actions and demands and proceedings on commercial contracts are final and cannot be extended by release on any ground, pretext or privilege.

Art. 581. Actions which have no time limited by the law merchant are outlawed in the time allowed by the forms of the common law for actions of like nature.

Art. 582. The prescription is interrupted by demand or any other kind of judicial summons addressed to the debtor or by renewal of the instrument on which the action is founded. In the first of these cases the time will begin to run anew when the last motion was made in the suit on the part of any litigating party; and in the second case, from the date of the new instrument, and, if the time of payment is extended by it, from the time of its maturity.

IV. COMMERCIAL CODE OF FRANCE.

[Translated by JOHN RODMAN, Esq., 1814.]

BOOK I. TITLE VIII. ,

Of Bills of Exchange, Promissory Notes and Limitation of Actions.

Section I. OF BILLS OF EXCHANGE.

Sec. 1. OF THE FORM OF BILLS OF EXCHANGE.

Art. 110. Bills of exchange are drawn from one place on another place;

They are dated;

They are specific;

The sum to be paid;

The name of the person who is to pay the same;

The time when, and the place where, the payment is to be made;

The value furnished, whether in money, in merchandise, in account, or in any other manner;

They are drawn to the order of a third person, or to the order of the drawer himself;

If they be drawn in sets of 1, 2, 3, 4, &c., it is so expressed.

Art. 111. A bill of exchange may be drawn upon one person, and payable at the domicile of a third.

It may be drawn by the order and for the account of a third person.

Art. 112. All bills of exchange, containing a fictitious name, quality, domicile, place where drawn, or where payable, are held to be only simple promises.

Art. 113. The signature of a married or single woman, not a sole trader, to a bill of exchange, is equivalent, with respect to her, only to a simple promise.

Art. 114. Bills of exchange signed by minors, not merchants, are void in respect to them, saving the rights of the respective parties, conformably to article 1312 of the Code Napoleon.¹

Sec. 2. OF PROVISION FOR PAYMENT.

Art. 115. Provision ought to be made by the drawer, or by the person for whose account the bill of exchange is drawn; but the drawer does not on that account cease to be personally liable.

Art. 116. There has been provision, if, when the bill of exchange becomes due, the person on whom it is drawn is indebted to the drawer, or to the person on whose account it is drawn, in a sum at least equal to the amount of the bill of exchange.

Art. 117. The acceptance is presumption of provision;

It is proof of it in regard to the indorsers;

Whether the bill be accepted or not, the drawer solely is bound to prove, in case of denial, that those on whom the bill was drawn, had provision at the maturity of the bill; otherwise he is held responsible, although the protest may have been made after the fixed time.

Sec. 3. OF THE ACCEPTANCE.

Art. 118. The drawer and indorsers of a bill of exchange, are joint and several sureties for the acceptance and payment of the bill at maturity.

Art. 119. The refusal of acceptance is verified by an act which is called protest for non-acceptance.

Art. 120. On the notification of protest for non-acceptance, the indorsers and the drawer are respectively bound to give security for

¹ Article 1312 declares that when minors, interdicted persons, or married women are admitted in these qualities to plead in bar to their engagements, the re-imbursement of any money which may have been paid to their use, during their minority, interdiction or marriage, cannot be obtained, unless it be proved that the sums paid have been beneficial to them.

N. B.—The "Code de Commerce" is cited throughout this work, for convenience, but incorrectly, as the Code Napoleon.

the payment of the bill when due, or for re-imbursement with expenses of protest and re-exchange.

The security, whether for the drawer or indorser, is a joint obligation only with the person for whom the security is given.

Art. 121. He who accepts a bill of exchange, contracts an obligation to pay the amount of it.

The acceptor is not released from his acceptance, even though the drawer should have failed without his knowledge before the acceptance.

Art. 122. The acceptance of a bill of exchange must be signed.

It is expressed by the word accepted.

It is dated, if the bill be at one or more days or months after sight.

And, in the latter case, the want of a date to the acceptance, renders the bill payable at the term expressed in it, counting from its date.

Art. 123. The acceptance of a bill of exchange, payable in another place than that of the residence of the acceptor, must indicate the domicile where the payment is to be made, or the protest in case of non-payment.

Art. 124. The acceptance cannot be conditional; but it may be limited in regard to the sum accepted.

In this case, the holder is bound to have the bill protested for the deficiency.

Art. 125. A bill of exchange must be accepted on its presentment, or, at the latest, twenty-four hours afterwards.

After twenty-four hours have elapsed, if it be not returned, accepted or not accepted, he who has retained it is liable for damages towards the holder.

Sec. 4. OF ACCEPTANCE SUPRA PROTEST OR BY INTERVENTION.

Art. 126. At the time of the protest for non-acceptance, the bill may be accepted by a third person, for the honor of the drawer, or one of the indorsers.

The acceptance supra is mentioned in the protest itself, and is signed by the acceptor.

Art. 127. The acceptor supra protest is bound to notify without delay, his acceptance to the person for whose honor it was made.

Art. 128. The holder of the bill retains all his rights against the

drawer and the indorsers, on account of the non-acceptance by the person on whom the bill was drawn, notwithstanding any acceptance *supra* protest.

Sec. 5. OF THE MATURITY, OR TERM OF PAYMENT OF A BILL OF EXCHANGE.

Art. 129. A bill of exchange may be drawn payable at sight;

At one or more days
one or more months } after sight.
one or more usances }

At one or more days
one or more months } after date.
one or more usances }

On a day fixed or determined.

At or during a fair.

Art. 130. A bill of exchange drawn at sight is payable on its presentment.

Art. 131. The maturity of a bill of exchange,

At one or more days
one or more months } after sight,
one or more usances }

is determined by the date of the acceptance, or by that of the protest for non-acceptance.

Art. 132. The usance is thirty days, which run from the day after the date of the bill.

The months are according to the regulation of the Gregorian calendar.

Art. 133. A bill of exchange payable at a fair, is at maturity on the evening preceding the day fixed for the closure of the fair, or the day of the fair, if it continue only one day.

Art. 134. If a bill of exchange fall due on a legal holiday, it is payable the preceding evening.

Art. 135. All days of grace, of favor, of usage, or local custom, for the payment of bills of exchange, are abolished.

Sec. 6. OF THE INDORSEMENT.

Art. 136. The property in a bill of exchange is transferred by means of indorsement.

Art. 137. The indorsement is dated.

It expresses the value received.

It mentions the name of the person to whose order it is payable.

Art. 138. If the indorsement be not conformable to the regulations of the preceding article, it does not affect the transfer of the bill; it operates only as a simple power of attorney.

Art. 139. It is forbidden to antedate the indorsements, under the penalty attached to forgery.

Sec. 7. OF LIABILITY.

Art. 140. All those who have signed, accepted, or indorsed a bill of exchange, are jointly and severally bound as sureties to the holder.

Sec. 8. OF THE GUARANTY.

Art. 141. The payment of a bill of exchange, independently of the acceptance and the indorsement, may be secured by a written guaranty.

Art. 142. This guaranty is given by a third person, on the bill itself, or in a separate instrument of writing.

The person thus becoming guarantee, is jointly and severally bound with the drawers and indorsers, saving any different stipulations between the parties.

Sec. 9. OF THE PAYMENT.

Art. 143. A bill of exchange must be paid in the kind of money mentioned in it.

Art. 144. He who pays a bill of exchange before it is due is responsible for the validity of the payment.

Art. 145. He who pays a bill of exchange when it is due, and without opposition, or notice of objection, is presumed to be validly discharged.

Art. 146. The holder of a bill of exchange cannot be compelled to receive payment for the same before its maturity.

Art. 147. The payment of a bill of exchange made on the presentment of a second, third, fourth, &c., of the set, is valid, when the second, third, fourth, &c., expresses that the payment of one renders the others void.

Art. 148. He who pays a bill of exchange on the presentment of a second, third, fourth, &c., of a set, without retiring that on which his acceptance is written, is not discharged in regard to third persons holding that accepted bill.

Art. 149. Objection to the payment of a bill is not admitted, except in case the bill be lost, or the holder has failed.

Art. 150. In case of the loss of a bill of exchange not accepted, he to whom it belongs may prosecute for the payment of a second, third, fourth, &c.

Art. 151. If the bill of exchange lost be accepted, the payment of it cannot be required on a second, third, fourth, &c., except by the order of the judge, and on giving security.

Art. 152. If he who has lost a bill of exchange, whether accepted or not, cannot present a second, third, fourth, &c., of the set, he may demand the payment of the bill lost, and obtain it, by order of a judge, on proving his property therein by his books, and giving security.

Art. 153. In case of refusal of payment, on a demand made, in virtue of the two preceding articles, the owner of a bill of exchange lost, preserves all his rights by a regular protest.

This protest must be made the next day after the bill lost became due.

It must be notified to the drawer and indorsers, in the forms and within the time hereafter prescribed for the notice of protest.

Art. 154. The owner of a bill of exchange, lost or mislaid, must, in order to procure a second, apply to his immediate indorser, who is bound to lend his name and assistance in an application to his own indorser, and so on, ascending from indorser to indorser, up to the drawer of the bill. The owner of the bill lost or mislaid must bear the expense.

Art. 155. The engagement of the surety mentioned in articles 151 and 152 is extinguished after the lapse of three years, if during that time there has been neither demand nor judicial prosecution.

Art. 156. The payments made on account, as part of the amount

of a bill of exchange, operate in discharge of the drawer and indorsers.

The holder is bound to have the bill protested for the balance.

Art. 157. The judges cannot grant any delay for the payment of a bill of exchange.

Sec. 10. OF PAYMENT SUPRA PROTEST, OR BY INTERVENTION.

Art. 158. A bill of exchange protested may be paid by any intervening person, for the honor of the drawer, or one of the indorsers.

The intervention and the payment must be stated in the certificate of protest, or at the bottom of it.

Art. 159. He who pays a bill of exchange supra protest, is substituted in the rights of the holder and bound to observe the same formalities.

If the payment supra protest, be made for the account of the drawer, all the indorsers are discharged. If it be made for an indorser, all the subsequent indorsers are discharged.

If there be a concurrence of several persons in the payment of a bill of exchange supra protest, he who effects the most towards the discharge is preferred.

If he on whom a bill was originally drawn, and against whom protest for non-acceptance has been made, presents himself to pay it, he shall be preferred to all others.

Sec. 11. OF THE RIGHTS AND DUTIES OF THE HOLDER.

Art. 160. The holder of a bill of exchange drawn from the continent and the European islands, and payable in the European possessions of France, whether at sight, or at one or more days, months, or usances, after sight, must demand payment, or acceptance, within six months from its date, under the penalty of losing his remedy against the indorsers, and even against the drawer, if the latter has made provision for the payment of the bill in the hands of the drawee.

A delay of eight months is allowed for the presentment of a bill drawn from the parts of the Levant, and Northern coasts of Africa, on the European possessions of France, and reciprocally, from the continent and European islands, on the French establishments in the Levant, and Northern coasts of Africa.

A year is allowed for the presentment of bills drawn on the Western coasts of Africa as far as, and including the Cape of Good Hope.

A year is also allowed for the presentment of bills of exchange drawn from the American continent and West India Islands, on the European possessions of France, and reciprocally, from the European continent and islands, on the French possessions or establishments on the Western coasts of Africa, on the American continent and West India Islands.

Two years are allowed for the presentment of bills of exchange from the East India continent and islands, on the European possessions of France, and reciprocally, from the European continent and islands, on the French possessions or establishments on the East Indian continent and islands.

The delays above mentioned, of eight months, one year, and two years, are allowed to be doubled in time of maritime war.

Art. 161. The holder of a bill of exchange must demand payment on the day of its becoming due.

Art. 162. The refusal of payment must be verified the next day after it became due, by a certificate, which is called a *protest for non-payment*.

If this day be a legal holiday, the protest is made on the following day.

Art. 163. The holder is not excused from making the protest for non-payment, neither by the protest for non-acceptance, nor by the death or failure of the person on whom the bill is drawn.

In case of failure of the acceptor, before the bill becomes due, the holder may cause it to be protested, and have recourse to the other parties on the bill.

Art. 164. The holder of a bill of exchange protested for non-payment, may pursue his remedy against the sureties,

Either individually against the drawer and each of the indorsers,
Or jointly against the indorsers and drawer.

The same right exists for each of the indorsers in regard to the drawer, and all the preceding indorsers.

Art. 165. If the holder would pursue his remedy individually against his immediate indorser, or the drawer, in case the bill came directly from him, he must give him notice of the protest, and in default of

re-imbusement, commence his suit against him within fifteen days from the date of the protest, if the said indorser or drawer reside within the distance of five myriameters (10 leagues, equal to about 25 miles).

This period of delay, with respect to the indorser or drawer, domiciled at a greater distance than five myriameters from the place where the bill of exchange was payable, shall be increased one day for every two and a half myriameters exceeding the five before mentioned.

Art. 166. In case of the protest of bills of exchange drawn in France, and payable out of the continental territory of France in Europe, the remedy against the drawers and indorsers residing in France, must be pursued within the following periods, to wit:

Two months for bills payable in Corsica, in the island of Elba, or Corsica, in England, and in the countries bordering on France.

Four months for those payable in the other states of Europe.

Six months for those payable in the ports of the Levant and on the Northern coast of Africa.

A year for those payable on the Western coasts of Africa, as far as, and including the Cape of Good Hope, and in the West Indies.

Two years for those payable in the East Indies.

These periods of delay are allowed in the same proportions, for pursuing the remedy against the drawers and indorsers residing in the French possessions situated out of Europe.

The above-mentioned delays, of six months, a year, and two years, are allowed to be doubled in time of maritime war.

Art. 167. If the holder pursue his remedy against the indorsers and drawer jointly, he is allowed, with respect to each of them, the period of delay determined by the preceding articles.

Each of the indorsers has the right of pursuing the same remedy, either individually or jointly, within the same period of delay.

In respect to them, the time allowed begins to run from the day after the service of judicial citation.

Art. 168. After the expiration of the above-mentioned periods of delay,

For the presentment of a bill of exchange at sight, or at one or more days, or months, or usances, after sight,

For the protest of non-payment,

For the action against the sureties,

The holder of a bill of exchange is barred of all rights against the indorsers.

Art. 169. The indorsers are equally barred from all remedy against prior indorsers, after the expiration of the above periods of delay, each as it respects himself.

Art. 170. The same exception to the right of action of the holder and the indorsers is allowed with respect to the drawer himself, if the latter prove that provision was made for the payment of the bill at its maturity.

The holder in this case preserves his right of action only against the person on whom the bill was drawn.

Art. 171. The effect of the exception or bar to the right of action pronounced in the three preceding articles, ceases in favor of the holder against the drawer, or against any of the indorsers who, after the expiration of the periods of delay fixed for the protest, the notice of protest, or the commencement of the suit, has received in account, as set-off, or otherwise, the funds destined for the payment of the bill of exchange.

Art. 172. Independently of the formalities prescribed for pursuing the remedy against the sureties, the holder of a bill of exchange protested for non-payment, may, by obtaining the permission of the judge, attach conservatively the personal property of the drawer, acceptors and indorsers.

Sec. 12. OF PROTESTS.

Art. 173. The protest for non-acceptance, or non-payment, is made by two notaries, or by one notary and two witnesses, or by a bailiff and two witnesses.

The protest must be made,

At the domicile of the person on whom the bill was drawn, or at his last known place of residence;

At the domicile of the person mentioned in the bill of exchange, who is to pay it in case of need;

At the domicile of the acceptor *supra* protest.

The whole is a single instrument of writing.

In case of false indication of domicile, the protest is preceded by certificate of perquisition or inquiry.

Art. 174. The protest contains,

The literal copy of the bill of exchange, the acceptance, indorsements, and directions therein mentioned;

The demand of payment of the bill of exchange.

It declares the presence or absence of the person who ought to pay it.

The motives of refusing payment, and the inability or refusal to sign.

Art. 175. No act on the part of the holder of the bill can supply the place of the protest, except in the cases provided for by article 150, and following, concerning the loss of a bill of exchange.

Art. 176. The notaries and bailiffs are bound, under the penalty of loss of office, and of costs and damages to the parties, to take an exact copy of the protests, and to transcribe them at length, day by day, and in the order of the dates, in a particular register, marked and certified, and kept in the forms prescribed for books of record.

Sec. 13. OF RE-EXCHANGE.

Art. 177. Re-exchange results from the act of redrawing.

Art. 178. Redrawing is when the holder of a bill protested draws another bill on the drawer, or one or more of the indorsers, of the former bill, to re-imburse himself for the principal of the bill protested, his expenses, and the new exchange which he pays.

Art. 179. Re-exchange is regulated, with respect to the drawer, by the current rate of exchange at the place where the bill was payable, on the place whence it was drawn.

It is regulated with respect to the indorsers, by the rate of exchange at the place where the bill has been remitted or negotiated by them, on the place where the re-imbursement is to be effected.

Art. 180. The bill redrawn is accompanied by the return account.

Art. 181. The return account contains,

The amount of the bill protested;

The expenses of protest, and other lawful charges, such as banker's commission, brokerage, stamp duties, and postage of letters.

It mentions the name of the person on whom the bill for re-imbursement is drawn, and the rate of exchange at which it is negotiated.

It is certified by an exchange agent.

In places where there are no exchange agents, it is certified by two merchants.

It is accompanied with the bill of exchange protested, the protest, or a certified copy of it.

In case the bill for re-imbursement be drawn on one of the indorsers, it is accompanied besides with a certificate attesting the course of exchange at the place where the bill protested was payable, on the place whence it was drawn.

Art. 182. There can be made only one return account on the same bill of exchange.

This return account is re-imbursed from indorser to indorser, and finally by the drawer.

Art. 183. The re-exchanges cannot be accumulated.

Each indorser, as well as the drawer, is charged with only one.

Art. 184. Interest on the principal of the bill of exchange protested for non-payment, is due from the date of the protest.

Art. 185. Interest on the expenses of protest, re-exchange, and other lawful charges, is due only from the day of judicial demand.

Art. 186. No re-exchange is due, if the return account be not accompanied with the certificates of an exchange agent, or of merchants, as prescribed in article 181.

Section II. OF PROMISSORY NOTES.

Art. 187. All the provisions relative to bills of exchange, and concerning,

The maturity of the bill,

The indorsement,

The joint and several responsibility,

The guaranty,

The payment,

The payment supra protest,

The protest,

The duties and rights of the holder,

The re-exchange, or expenses,

are applicable to promissory notes without prejudice to the regulations relative to the cases provided for by articles 636, 637 and 638 of title 2, book IV.

Art. 188. Promissory notes are dated.

They mention,

The sum to be paid,

The name of the person to whose order they are made,

The time of payment,

The value received, whether in money, in merchandise, on account or in any other manner.

Section III. OF LIMITATIONS OF ACTIONS.

Art. 189. All actions relative to bills of exchange and promissory notes, signed by merchants, traders or bankers, or for commercial transactions, are limited to five years, counting from the day of the protest, or from that of the last judicial proceeding, if there has been no judgment, or if the debt has not been acknowledged by a separate instrument in writing.

Nevertheless, persons presumed to be debtors shall be bound, if required, to declare under oath, that they are no longer indebted; and their widows, heirs or assigns, that they verily believe that nothing remains due.

GENERAL INDEX.

RAND.C.P.

(2843)*

GENERAL INDEX.

[N. B.—Vol. 1 comprises §§ 1-567; Vol. 2, §§ 568-1391; Vol. 3, the residue.]

Reference is to Sections.

A

"A. B., BEARER,"

a note payable to, is payable to A. B. only, 160, 175.
such a note is nonnegotiable, 160, 175.

"A. B., OR BEARER,"

a note payable to, equivalent to one payable to bearer only, 160, 175.
transferable by delivery, 159, 160, 175.
and negotiable, 175.
the holder need not prove title, 160.
nor consideration, 159.
the bearer may sue both makers, although A. B. is one of them, 160.
the declaration need only aver possession, 160.
indorsement of A. B. need not be proved, 160.
in some states can only be transferred by indorsement, 160, 175.
note "to ———, or bearer," original holder may sue without filling blank,
160.
averments and proof in actions on such notes, 160.

"A. B., OR HOLDER,"

a note payable to, is equivalent to one payable to bearer only, 160.

"A. B., SHERIFF,"

indorsement, as notice of its character, 1010.

"A. B., SYNDIC,"

indorsement, as notice of its character, 1010.

"A. B., TRUSTEE,"

indorsement, as notice of its character, 1010.

ACCEPTANCE,

general principles:

defined, 5, 588.

is governed by the law of the place of acceptance, 36.

and not by the domicile of the acceptor, 36.

by parol—sufficiency determined by *lex loci contractus*, 29.

agreement for—construction by *lex loci contractus*, 29.

discount by drawee before, 588.

[Reference is to sections. Vol. 1, §§ 1-587; vol. 2, §§ 588-1391; vol. 3, §§ 1392-1904.]

ACCEPTANCE—Continued.

may be waived, 588.

not always necessary, 588.

is necessary to create a liability on the part of the drawee, 589, 635, 644.

although bill drawn against consignment of goods received, 589.

drawing of bill on one's self is equivalent to an, 588.

drawn by partner upon his firm, 588.

by agent on his principal, 588.

by president of a corporation upon its treasurer, 588.

certification of checks equivalent to, 8, 568, 642.

acceptance of bill drawn in fictitious name, 148.

and payable to drawee's order, 148.

name of drawee need not appear on the bill, 171, 588.

bill cannot be directed to one person and accepted by another, 171.

may be drawn on several persons and accepted by one, 171.

declaring upon such an acceptance, 171.

an indorsement changed into an acceptance is a material alteration, 171.

a bill may be addressed "at" instead of "to" the drawee, 171.

or directed to a particular house instead of to the drawee by name, 171.

instrument in form of note, addressed to, and accepted by, third person, 171.

a renewal of an, is the same as an extension, 968.

consideration for, 633, 634.

debt from acceptor to drawer is sufficient, 633.

to payee is sufficient, 633.

cannot be questioned against bona fide holder, 633.

only one part should be accepted, 240.

rights under bill of lading, 634, 625 n.

obligation to accept:

none because the drawee is indebted to the drawer, 589.

except bills or drafts drawn on a banker, 589.

drawee of check not liable to payee without, 589.

not presumed from possession by drawee before dishonor, 589.

unaccepted bill, not an assignment of the fund, 589.

so, an uncertified check, 644, 605 n.

bill of lading retained by payee without acceptance, 589, 634 n.

foreign statutes, 590.

delivery:

delivery is necessary to complete an acceptance, 216, 637, 618.

an acceptance may be canceled before its delivery, 216, 637.

acceptance has no effect until bill is completed and delivered, 216.

effect of unreasonable detention by drawee, 216.

blank:

on blank paper no liability until filled, 635.

signature of the drawer may be added after acceptance, 185.

blank may be filled after acceptor's death, 373.

acceptance supplies the omission of drawee's name, 171, 185.

blank acceptance filled payable at a particular place, 186.

filling does not discharge an accommodation indorser, 186.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACCEPTANCE—Continued.**place of payment:**

acceptance in blank is to pay at place of payment named on bill, 122.
when default is made in accepting at the place on which it is drawn,
drawer is liable for its payment at that place, 122.

place may be written over blank, 588.

foreign statutes, 608.

making payable at banker's authorizes payment by banker, 636.

foreign statutes, 608.

if no place be named, the acceptance is general, 122, 1113, 1120.

the acceptor may qualify to pay at a particular place, 122.

this may be done by accepting "payable at," etc., 122.

or by simply adding his address to his signature, 122.

in England, acceptance must be payable at a specified place, "only, and
not elsewhere," 122, 126.

by whom given:

by the drawee named, 591.

by stranger equivalent to a promissory note, 591, 1188.

or a guaranty, 863.

when no drawee named, 591, 588.

place of payment only named, 591.

drawee being an infant, 591.

for honor, 594.

by agent:

holder may require evidence of agent's authority, 592.

if refused by agent, equivalent to a dishonor of the bill, 592.

authority presumed from payment of other acceptance, 363.

by public officer, 350.

United States may be bound by the, 592.

though it cannot be sued on such an, 592.

foreign statutes, 592.

holder not bound to take the, of an agent, 592.

agent liable personally if the, is without authority, 592.

drawn by principal on agent, 592.

drawn upon and accepted by agent of a company, 592.

acceptance "by A. B., Treasurer," 592.

liability of principal or agent, how indicated, 139, 145, 171, 335.

by insufficient corporate officers, 593 n.

by partners:

in firm name, binds all, 171.

by one partner sufficient, 593.

even though it be in his individual name, 593.

but should be in firm name, 593.

foreign statutes, 593.

several drawees not partners, by all, 593.

though an, by part only, binding on those who do, 593.

in the alternative, may be by either, 593.

drawer and drawee having common partner, 404.

members of a committee, 593 n.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACCEPTANCE—Continued.

when made:

- within a reasonable time, 595.
- generally twenty-four hours, 595.
- unless shortened by refusal, 595.
- or by departure of the regular daily mail, 595.
- not so in the United States, 595.
- if no answer within that time, the holder should protest, 595.
- if longer time allowed, prior parties should be notified, 595.
- foreign statutes, 595.
- detention equivalent to an, 595.
- if payable per advice, not before advice received, 595.
- after acceptance refused and acceptance *supra* protest, 596.
- after transfer, 596, 632.
- after it has matured, 596.
- after death of the drawer, 596.
- should not be after the bankruptcy of the drawer, 596.
- before or after transfer, same liability, 632.

acceptance before drawing:

- may be by force of statute in England, 597.
- signature on blank paper, 597.
- may be declared on as given before, 597.

date of:

- not necessary, 83, 598.
- unless payable at a certain time after sight, 83, 598.
- signature of drawee and date over it are sufficient, 598.
- written above signature in a different writing, is presumptive, 598.
- foreign statutes, 608.
- if not dated, presumptively given at date of bill, 83, 598.
- or after date of bill, 598.
- or before the maturity of the bill, 83, 598.
- or within reasonable time after date, 598.
- actual date may be shown by parol evidence, 83, 598.

form:

- no particular words necessary, 599.
- may be implied, 599.
- from conduct of drawee, 599.
- or from other circumstances, 599.
- after refusal, letting holder have goods to sell, 599.
- drawee afterwards receiving a consignment of goods, 599.
- "accepted," written on a bill, is a sufficient, 5, 600.
- "seen," "presented," written on a bill, is a sufficient, 600.
- marking bill after banking hours, 600.
- "excepted" written by mistake for "accepted," 600.
- writing one's name across face of bill, 600, 603.
- English statutes, 603.
- must be direct, positive, and unambiguous, 600.
- what are sufficient expressions, 600, 601.
- part payment, 601.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACCEPTANCE—Continued.

not within the statute of frauds, 603.

nor is an agreement for, 603.

by parol:

is sufficient, 603, 604.

when writing not required by statute, 604.

so as, to pay a bill out of the proceeds of certain goods, 604.

holder not obliged to take, 604.

not necessary to aver that it was in writing, 604.

no protest of inland bills by statute of Anne, unless in writing, 604.

statutes of England require foreign bills to be accepted in writing, 604.

and signed by the acceptor, 604.

some American statutes require writing, 605.

credit on books insufficient, 605 n.

parol proof of acceptance as a collateral fact, 605.

acceptor's signature:

mere signature not sufficient, in England, under 19 & 20 Vict., 606.

position of the signature immaterial, 606.

in California, must be written across the face of the bill, 606.

may be written upon another paper, 606.

but may be required to be written on the bill, 606.

may be by telegram, 606.

so an agreement to accept by telegram, 606 n.

special provision in Oregon statute for bills drawn by telegram, 606.

American statutes, 606.

foreign statutes, 607.

authority to draw:

is an agreement for, 609.

is equivalent to, 609.

is a promise to pay, 609 n.

must be express and special, 609.

what words amount to, 609.

to draw in favor of creditors, 609.

may be given by blank acceptances, 609, 612 n.

promising a credit in favor of a third person, 609.

refusing to accept a bill after giving authority to draw, 609.

authority must be known and relied on, 610.

and strictly followed, 609 n., 610 n.

a promise to notify one when he may draw, 610.

an authority to draw "on us, or either of us," adding, "We jointly and severally hold ourselves accountable," 610.

revoked by death of the drawee, 610.

or by his bankruptcy, 610.

may be continuing, 610.

agreement for:

of an existing bill, 5, 611.

written agreement to pay less, 600.

statute of frauds, 603.

"will indorse, if necessary, for the amount of purchases," 611.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

ACCEPTANCE—Continued.

- promise to accept, with statements inconsistent with such promise, 611.
- when taken on the faith of such promise, 612.
- statutes, 612.
- by telegram, 612.
- when made with the drawer, after bill dishonored, 612.
- letter promising payment, 612.
- though letter not received until after maturity of the bill, 612.
- when not taken on faith of the promise to accept, 612.
- on bill with drawer's name blank, 612 n.
- verbal agreements, 613.
- although written acceptance required by statute, 613.
- parol evidence, 613.
- bills to be drawn, 597, 614.
- taking bill on the faith of the promise is sufficient, 597, 600, 614.
- not necessary that the promisor have funds of the drawer, 614.
- a promise to accept requires a valid consideration, 614.
- a verbal promise to accept for accommodation, 614.
- is within the statute of frauds, 614.
- when made dependent upon a contract on promisee's part, 614.
- must clearly describe the bill, 614.
- must be particular and plain in terms, 614.
- a general letter of credit is sufficient, 10, 614.
- communicated to holder, and relied on by him in taking the bill, 614.
- St. 1 & 2 Geo. IV. c. 78, and American, 614.
- such promise must be acted on in a reasonable time, 614.
- must be relied on, 615.
- verbal agreements for, of nonexisting bill, 616.
- when not communicated to holder, 616.
- applies only to bills payable a certain time after date, 617.
- drawee requesting holder to leave bill, with promise to accept it, 617.
- returning bill for correction, with promise to accept, 617.
- drawn against a cargo, consignee saying "he will not accept until the ship arrives," 617.
- must accept if bill of lading received, 634.
- effect of failure to receive, 600 n.
- agreement to give notice to party when he may draw, 617.
- may be presumed from drawee having funds of the drawer, 617.
- sufficient, though bill has been transferred, 618.
- if made to party for whose account bill was drawn, 618.
- though he may not be a party to the bill, 618.
- will inure to the benefit of subsequent holders, 618.
- though not known to them until afterwards, 618.
- action for breach, after tender of bill, 618.
- bill discounted and lost, but agreement enforced in equity, 618.
- if obtained by fraud, no liability except to bona fide holder, 618.
- delivery necessary to make an, 618.
- indorsing upon a bill after its presentment, 618.
- foreign statutes, 619.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACCEPTANCE—Continued.

detention:

when it implies, 620.
 especially if long and contrary to established custom, 620.
 detention and destruction after refusal to accept, 620.
 twenty-four hours, and then returned marked "Not good," 620.
 ten or twelve days, for receipt of funds promised by drawer, 620.
 if detained under a special custom, 620.
 or by consent as a voucher for part payment, 620.
 not conclusive, though, until action brought, 620.
 in London, check may be detained until 5 p. m., 620.
 American statutes, 620.

conditional:

holder may insist upon an absolute and unconditional, 621.
 may refuse and treat bill as dishonored, 621, 1136.
 by Code, in California, 621.
 liability of drawer to holder, how affected, 621.
 if holder receives, he must notify all previous parties, 621.
 in England, must obtain the consent of all previous parties, 621.
 or they will be discharged, 621.
 American statutes requiring dissent, 621 n.
 unless drawer has no funds in drawee's hands nor right to draw, 621.
 if protested afterwards, acceptance is waived, 621, 1146.
 qualified, are either conditional or partial, 622.
 whether conditional is a question of law, 622.
 "in favor of A. B. only," 621 n., 174 n.
 "payable when house is ready for occupancy," 622.
 on the performance of a contract, 622, 624 n.
 "take the sum out of our share of the firm grain," 622.
 out of a certain fund, 622.
 out of rents, subject to condition of lease, 623.
 on condition of its renewal, 622.
 on certain event, 622.
 "if in funds," 623.
 "taking your drafts," 623.
 "as soon as he shall sell the goods," 623.
 "when collected," 623.
 "when in funds," 625.
 "administrator," added to acceptor's signature, 623.
 foreign statutes, 627.
 contemporaneous written conditions, 624.
 cannot be made conditional by a condition subsequently added, 624.
 contemporaneous condition cannot be shown by parol evidence, 624.
 e. g. for surrender of note by a third person, 624.
 though in writing, is not admissible to defeat a bona fide holder, 624.
 if ambiguous, may be explained by parol, 624.
 the onus of proving the condition is upon the acceptor, 625.
 acceptor and holder bound by the condition, 625.
 not liable until the happening of the event, 625.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACCEPTANCE—Continued.

representatives then liable, if acceptor dead, 625.
 condition annexed to an indorsement prior to the acceptance, 625.
 when performance is prevented by operation of law, 625.
 or by acceptor's act, 625.
 onus of proving performance of the condition is on the holder, 625.
 whether performed or not is a question for the jury, 625.
 the condition and performance should be averred in pleading, 625.

partial or qualified:

may be for part of the amount, 626.
 should be protested for balance, 626.
 may be to pay part in money and part in bills, 626.
 foreign statutes, 627.
 drawn payable in one currency, accepted payable in another, 626.
 may be made payable in installments, 626.
 changing the time of payment, 626.
 offer to pay bill in certain time communicated to holder, 626.
 to see bill "paid eventually," 626.
 on the last day of grace, 626.
 which misstates time of the maturity of the bill, 626.
 "to pay when due," 626 n.
 a condition that bill be renewed up to a certain time, 626.
 making bill payable at a particular place, 626.
 does not affect drawer's liability to payee, 626.
 if at the acceptor's residence, 626.
 or at a place different from that named in the bill, 626.
 payable at a certain bank in the town named, 626.
 does not affect rights of prior parties by California Code, 626.
 blank, filled up, payable at a particular place, 626.
 making bill payable there, "only, and not otherwise or elsewhere," 626.

what it admits:

admits signature of drawer, 629, 753, 1867.
 of annexed bill of lading, 629.
 estoppel as to forgery, 164.
 foreign statutes, 641.
 paying one forged, is not an estoppel, 164, 629.
 admits genuineness, 630.
 capacity and authority of the drawer, 631.
 restricted in Louisiana, only in favor of a bona fide holder, 631.
 admits authority of drawer as executor, 631.
 or agent, 360, 631.
 admits existence of firm, 631.
 drawer's legal capacity at time of drawing the bill, 631.
 as also that of the payee, 631.
 does not admit the signature of the indorser, 632, 1468 n.
 nor agent's authority to indorse, 632.
 though indorsed before acceptance, 632.
 and identical with that of drawer, 164, 632.
 nor validity of indorsement, 632.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACCEPTANCE—Continued.

when drawn in a fictitious name, payable to the drawer's own order
632.

presumptions:

raises the presumption of funds in drawee's hands, 633, 1867.
not if bill requests the drawee to pay if in funds, 633.
only conclusive in favor of a bona fide holder, 633.
foreign statutes, 641.

construction and effect:

liable as principal debtor, 628.
most strongly against the acceptor, 635.
liable according to the terms of the bill, 635.
for attorneys' fees included on the face of bill, 635.
not for re-exchange, 635.
or costs of action against other parties, 635.
effect as a payment of other debt, 1552.
as assignment of fund, 589 n., 635, 644.
and of securities in hand, 635.
before or after indorsement, same effect, 632.
effect of making payable at banker's, 636.

revocation:

may be at any time before delivery, 637.
California Code, 637.
of an agreement to accept, 637.
complete acceptance cannot be revoked, 637.
not after being communicated to holder, 637.
not for insolvency of drawer, 637 n.
after an offer to accept has been refused by holder, 637.
canceled by mistake, 637, 638.
given under mistake as to drawer's funds in hand, 637.
obtained by fraud, 637.
what amounts to a revocation, 637.
what is cancellation, 638.
question for jury, 638.
foreign statutes, 638.

discharge:

by payment, 639.
by release, 639.
release of collateral in hands of holder, 639.
not before maturity as to a bona fide holder, 639.
validity determined by law where discharge given, 639.
release may be implied, 639.
taking new security, 639.
to release two acceptors, separate bill of either is sufficient, 639.
will not discharge a subsequent acceptance, 639.
creditor's composition deed will not bind bona fide holder, 639.
notes, to be given by compounding debtor, should be tendered, 639.
appointment of acceptor as executor of holder, 639.
or as administrator, 639.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

ACCEPTANCE—Continued.

delay in presenting bill for payment, 639.
 drawer, not being holder, can release from liability to himself, 639.
 but not to subsequent holders, 639.
 foreign statutes, 641.
 voluntary payment after discharge not recoverable, 636.

walver:

no effect on character of bill, 588.
 distinction between walver before and after breach, 640.
 consideration necessary, 640.
 may be by parol, 640.
 even after breach, 640.
 should be in express words, 640.
 or actions equivalent to such words, 640.
 protest after conditional acceptance, 621, 1146.
 protest in ignorance of agreement to accept, 638.
 what is not a sufficient walver, 640.
 receiving partial payment with promise to pay balance, 640.
 receiving interest from drawer and delaying to apply for payment to the acceptor, 640.
 mere indulgence on holder's part not, 640.
 pleading a walver, 640.
 walver is a question of fact for the jury, 640.
 if in writing, its interpretation and effect are for the court, 640.
 see "Acceptor"; "Agent"; "Certified Check"; "Presentment for Acceptance."

ACCEPTANCE SUPRA PROTEST, OR FOR HONOR,

defined, 5, 594, 1187.
 who may make, 594.
 form of, 5 n., 1187.
 presence of notary and witnesses, 1186.
 Statute of Frauds, 594.
 by and for any person, 1186.
 for drawer, if no one designated, 1186.
 several for different parties, 1186.
 not for same party, 1186.
 preference among several, 1186.
 need not be received, 1187.
 may be received, and bill protested against drawer, 1187.
 demand of drawee still necessary in England, 1187.
 protest necessary, 1187.
 admits drawer's signature, 1188.
 acceptor supra protest may sue prior parties, 1188.
 and is liable to subsequent parties, 1188.
 amounts to a promissory note, 1188.
 California Code, 1188.
 foreign statutes, 1189-1193.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

"ACCEPTED,"

written across the face of a bill, 591, 600.
 "excepted" written by mistake for, 600.
 sufficient for an acceptance by foreign statute, 607.
 or for certification of a check, 648.

ACCEPTOR,

defined, 4.
 discharge by foreign insolvency, 58.
 discharge granted under law of place of original contract, 58.
 blank acceptance coupled with an interest, filled after acceptor's death, 183.
 acceptor for accommodation of partner not liable to his firm as purchaser, 402.
 liability of an, not paid, is sufficient consideration to support a note, 459.
 accommodation, 473, 901.
 giving time to drawer will not discharge, 900, 901.
 nor to drawer accommodated by acceptor, 955.
 or co-acceptor, 955.
 entitled to be subrogated to securities of the drawer, 982.
 has an action against the drawer for indemnity, 473, 1420.
 on part payment, 1412.
 liability governed by what law, 31.
 liability of conditional, 625.
 not liable until condition performed, 625.
 or prevented by operation of law, 625.
 is the principal debtor, 628, 636, 900.
 answerable to drawer, 628.
 liable for interest, 1705.
 liable for exchange, 1714.
 not discharged by want of protest, 628 n.
 or of demand, 628 n.
 or notice of dishonor, 1211.
 may give notice of dishonor, 1234.
 effect of making payable at banker's, 636.
 accommodation, may sue the drawer after he has paid the bill, 628, 1421.
 liability of accommodation acceptor, 634.
 liable to bona fide holder with indorsement of fictitious payee, 164, 666.
 reissue of bill, 683, 1422.
 release of drawer will not release acceptor, 900.
 purchaser from, a bona fide holder, in England, 990.
 contra, in New York, 990.
 defense, readiness to pay, 636.
 failure of consideration, 634 n.
 see "Acceptance."

ACCOMMODATION PAPER,

defined, 15, 472, 473 n., 479 n.
 is a valid consideration, 15, 445, 472.
 accommodation acceptor governed by law where bill first negotiated, 50.
 accommodation indorser by law where delivered, 38.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACCOMMODATION PAPER—Continued.

- presumed, if bill is payable at the drawer's house, 122.
- or if discounted for maker, 472.
- or drawer, 692.
- death of accommodation party extinguishes, 183 n., 221, 474.
- except against bona fide holder, 474, 476, 501.
- notice as affecting bona fides, 1020.
- an executor cannot complete an accommodation indorsement of testator, 442.
- by married woman, 291.
- usurious inception, 526.
- usury by party accommodated, 921.
- accommodation in appearance only, 472.
- relation changed, 472, 473.
- changed to valuable consideration, 472.
- partly valuable, 472.
- explained by parol evidence, 692.
- pledge of, 475.
 - amount recoverable by pledgee, 475.
- diversion of, 475.
 - when available as a defense, 475.
 - shifts burden as to consideration, 475.
 - prevented by injunction, 475.
 - trover lies, 475.
- by partners:
 - have no power to give, 472, 416.
 - by indorsement, 416.
 - good defense against party with knowledge, 416.
 - partner giving is liable individually, 416.
 - in consideration of similar acceptances for the firm by the drawer, 416.
 - "surety" added to signature presumption that it is, 416.
 - note of one partner guaranteed by the firm is notice that it is, 416.
 - blank acceptance in firm name is notice that it is, 416.
 - blank draft signed by firm, drawer authorized to fill it up, 416.
 - if given by consent of all partners the firm is liable, 417.
 - such consent may be express or implied, 417.
 - not necessarily under a special authority, 417.
 - promise to pay afterwards binds firm, 417, 418.
 - consent will include a renewal of note after dissolution, 417.
 - injunction to prevent the giving of, by member of a firm, 417.
 - burden on holder to show that consent was given, 418.
 - must be clearly shown, 418.
 - admission by one partner insufficient, 400.
 - inquiries by holder at bank where firm did business, not sufficient, 418.
 - habit of giving will not be evidence of the firm's assent, 418.
 - blanks left for date and rate of interest not conclusive, 418 n.
 - when the benefit is received by the firm, firm liable, 419.
 - no defense against a bona fide holder, 419.
 - accommodation shifts burden as to good faith, 420.
 - notice not presumed from indorsement by common partner, 420.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACCOMMODATION PAPER—Continued.

by corporations:

by corporations, 334.

is ultra vires, 334, 472.

cannot be ratified by the corporation, 334.

president cannot bind company by accommodation indorsement, 36

nor can a national bank become an accommodation indorser, 334.

though ultra vires, it is good in the hands of a bona fide holder, 472.

violation of express statute is a good defense against bona fide holder, 334.

onus of good faith shifted by proof of accommodation, 472.

by agents:

a general power to give bill or note does not include, 361.

if given by the agent with principal's consent and to take up on

similar paper upon which he was liable, he would be bound, 361

by agent to principal, 384.

may be shown between the immediate parties, 472, 473.

as regards third parties, 473.

accommodated party liable to action for indemnity, 473, 628.

or trover, if he pays and holds, 473.

or bill in equity to prevent diversion, 473.

no effect until discounted, 474.

or comes into the hands of a holder for value, 474.

when revocable, 474.

liable on, as principal and surety, 474.

may be transferred as collateral, 475, 797, 800.

amount recoverable when so transferred, 452 n., 473, 475.

diversion, when admissible, 476, 1803, 1804.

with name blank and filled after payee's insolvency, 476.

United States statutes as to rate of discount of national banks apply, 526.

not a defense against a holder for value, 476, 561.

though such holder knew its character, 15, 476, 561.

and purchased after maturity, 561, 670, 677.

but in such case he may show that payee has paid the note, 561.

onus of proving holder to be for value, 567.

and bona fide, 1028.

liability of accommodation parties:

indorsers inter se, 692, 835.

right of contribution, 971.

liable to surety, 926.

indorsement by stranger, 834.

maker, 907.

liable to surety, 926.

acceptor, 634.

to pledgee, 995.

to purchaser from drawer, 692.

to bona fide holder, 995.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACCOMMODATION PAPER—Continued.

- to party accommodated, 473.
- revocable until discounted, 475.
- discount after maturity, 474.
- reissue after maturity, 474.
- inter se, as principal and surety, 475a.
- not so, as to third parties, 475a.
- creditors, as against fraudulent conveyance, 473, 475 n.
- debtors, as to conveyance of property, 692.
- discharge by release of principal, 475a.
- or collateral, 475a.
- or by extension, 475a.
- by want of demand and notice, 475a.
- defense against bona fide holder, 476.
- against holder with notice, 476.
- against purchaser after maturity, 677.
- see "Surety."

ACCOUNT,

- to, is equivalent to a promise to pay, 87.
- so, "to be accountable for," 87.

"ACCOUNTABLE,"

- to be, is equivalent to a promise to pay, 87.
- after indorsement, waives demand and notice, 1358.

ACKNOWLEDGMENT,

- of debt is not sufficient to constitute bill or note, 88.
- so provided by some statutes, 88.
- sufficient to take bill out of the statute of limitations, 88, 1613.
- sufficient proof of signature, 1672.
- may dispense with production of bill, 1702.
- see "Statute of Limitations."

ACTION,

- on what instrument:
 - on choses in action, 650.
 - on agreement to indorse, 688.
 - to accept, 609.
 - to guaranty, 860.
 - on blank acceptance, 635.
 - on collateral security, 796, 1676.
 - on original, after renewal taken, 1547.
 - on the original consideration, 150, 1581, 1673.
 - on interest warrant or coupon detached from corporation bond, 150.
- by a married woman:
 - at common law, 320.
 - by husband and wife, 320.
 - in New York before recent statutes, 320.
 - as sole trader, 298-300.
 - by husband alone, 320.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACTION—Continued.

- on note made to wife in her maiden name, 320.
- without set-off of her debts, 320.
- injunction against collecting or disposing of note belonging to wife, 320.
- on bond to herself, as administratrix, and husband, 320.
- on bills which are common property of both, 320.
- by wife alone, 320.
- by the husband's executor, 325.
- between husband and wife, 316.
- by indorsee of the husband, 316.
- or of the wife, 316.
- by infant:
 - infant may sue upon a note as payee or holder, 278.
 - partner, 278.
- by executors and administrators, 1631, 1642, 1650.
 - when payees, 158, 440, 1642.
 - as bearer, 1650 n.
 - after revocation of letters, 158.
 - by administrator de bonis non, 158, 440.
 - where payee deceased before note made, 150.
- by guardian when payee, 158.
- principal and agent, 1657.
 - by principal on note to agent without indorsement, 156.
 - by B. on note to C. for B.'s debt in C.'s name, 156.
 - by principal on note to "A. B., agent," or "A. B., agent of C. D.," 156, 157.
 - or by the agent, 156, 157.
 - payable to officer of corporation, "or his successors in office," 157.
 - municipal corporation in the name of the payee's official successor, 157.
 - but successor cannot bring suit in his own name, 157 n.
 - by survivors instead of successors, 157.
 - by bank on note to cashier, 157.
 - by cashier in his own name, 157 n.
 - by collecting agent, 1657, 1658.
 - by public officer named as payee, 351.
 - by government on bill payable to officer, 158 n., 1660.
- by payee, 1631, 1632.
 - by A. on bill to "order of A.," 151.
 - for use of party discounting, 223 n.
 - joint payees, 155, 1632, 1647.
 - payees several in interest and joint action, 155.
 - by "A. or B.," 155.
 - for use of indorsee or assignee, 1634.
 - by initials, 1631.
- by "real party in interest," 1631.
 - equitable title sufficient, 1651.
 - although other nominal payee, 1651.
 - and necessary, 1651.
 - payee's title cannot be questioned by maker, 1651.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

ACTION—Continued.**by bearer:**

if payable to bearer, 159, 160, 175, 445, 1631, 1648, 1650.
although a mere trustee, 1648 n.
where no payee designated, 150.
on note "to order," 161.
to "A., or bearer," 1648.

by indorsee, 1631, 1633, 1638.

nonnegotiable paper, 656.
joint indorsees, 1635.
of part, 635.
jurisdiction of United States courts, 1637.
attorney taking for suit, 1658.

by holder without indorsement, 156, 1653, 1654.

note payable to A. originally delivered to B., 161, 1655.
or order, 190.
purchaser from payee without indorsement, 151.

by holder without title, 1650, 1652.**by owner without possession, 1656.****by assignee, 1631, 1639, 1640.**

what law determines, 49, 55.
on sealed instrument, 70.
guaranty of drafts to be drawn, 860.

by pledgee, 1638.

amount of recovery, 797.

by trustee, 1650, 1651, 1659.

not by cestui que trust, 1659.

by drawer:

against acceptor in payee's name, 634.
after payment, 1427, 1641.

by accommodation acceptor:

against drawer, 1647.

by indorser:

after payment, 1430, 1431, 1643, 1645.
striking out indorsement, 1644-1646.
transfer pending suit, 1652.

by surety:

for contribution, 977, 978, 1430.
including costs, 977, 991.
exoneration, 978, 1435.
by one joint surety, 979.
defeated by change of relation, 980.
by action for money paid, 1435, 1436.

by payor supra protest:

against party honored and prior parties, 1195, 1437.

between parties identified in interest:

between partners, on contracts not in business of firm, 403.
with no ultimate liability to contribute, 403, 404.
by firm against partner, 403, 404.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ACTION—Continued.

- or partner's accommodation acceptor, 402.
- partner against firm, 153.
- assignee against firm, 153.
- between firms having common partner, 153.
- omission of such partner, 403.
- by payee, identified with maker, 153, 1671.
- by B. and C. on joint and several note of A. and B., 403.
- on note of A. and B., by B. or B.'s executor, 153.
- or assignee, 153 n.
- by bearer on note of A. and B. to "A., or bearer," 153 n.
- against joint debtors, 1665, 1666.
 - joint and several debtors, 1667.
 - partners known at making, sufficient, 171.
 - infant partner, 278.
 - surviving, 1668.
- joint action against several debtors:
 - on sealed instruments, 12, 70.
 - on bills and notes, 19, 739, 1661, 1669, 1670.
 - liability not changed, 1669 n.
 - against irregular indorser and maker, 848.
 - guarantor and maker, 862, 1669 n.
 - against guarantor and indorser, 862.
 - must join parties primarily liable, in Mississippi, 1669.
 - judgment against maker and indorser paid by indorser, 1670 n.
- against whom:
 - against drawee or acceptor, 1664.
 - without acceptance, 1664.
 - against drawer of check, 643, 1664.
 - against indorser, 1672.
 - against surety, 1672.
 - against married woman jointly liable, 287.
 - sued alone, 298.
 - against drunkard before inquisition, 264.
 - against agent, 1672, 1680.
 - against public agent, 351.
 - against "A. B., sheriff," indorsing, 168, 351.
 - against stranger to paper, 1672.
- when:
 - before maturity by attachment or bill in equity, 1586.
 - on day of maturity, 1037, 1069, 1092, 1586.
 - on maturity of installment, 1047, 1589.
 - of interest, 1048, 1589, 1705.
 - of interest secured by other note, 1410.
 - of interest coupon, 1589.
 - of collateral, 1047.
 - on nonacceptance, 1136, 1588.
 - notwithstanding subsequent demand of payment, 1136.
 - refusal to certify check, 1323.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

ACTION—Continued.

- and notice of dishonor, 1198.
- not before payment, by guarantor, 862.
- by surety, 1590.
- by indorser, 1430, 1590.
- except collateral held by him as indemnity, 743 n.
- not before payment, by payor supra protest, 1195.
- by drawer, 1427.
- after notice of default, against guarantor, 886.
- against indorser, 1587.
- after action against principal debtor, 1590.
- after demand, 1039, 1070, 1071.
- on guaranty of payment "when due," 851.
- note payable "on or before" certain day, without previous demand, 1586.
- note payable "within two years," 1588.
- effect of extension, 1588.
- interest not to begin until certain time after maturity, 1588.
- on happening of condition, 1588.
- object and form:
 - on sale of bill, lies for the price agreed upon, 480.
 - note paid by maker for liquor illegally sold may be recovered, 532.
 - for money paid by agent on illegal contract for principal, 587.
 - to recover collateral, 1675.
 - in debt, 1674.
 - in assumpsit, 1674.
 - in tort, 1673.
 - in trover, 1679.
 - in replevin, 1680.
 - in equity, 1685.
 - summary proceedings, 1673, 1643.
 - and see "Equity"; "Lost Bill"; "Statute of Limitations"; "Trover."

ADDITIONAL STIPULATION,

- for interest does not affect negotiability, 200.
- does destroy negotiability in Austria, 200.
- ineffectual in Germany, 200.
- exchange does not affect negotiability, 200.
- unless a cover to evade the usury laws, 200.
- a request to charge the same to the account of the drawer, 201.
- so, a statement that the drawer will credit the payment in a particular way, 201.
- in certificates of deposit payable on "return of this certificate," 201.
- and on return of the maker's guaranty, 201.
- on return of pass book, 201.
- "and this shall be your warrant and good as my receipt for said money." 201 n.
- other stipulations which do not affect negotiability, 201, 208.
- "which I am truly thankful for and shall never be forgotten by me," 201.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ADDITIONAL STIPULATION—Continued.

- "ne varietur," common in Louisiana, 201.
- "in case of need, apply to Messrs. A. B., at C.," 201.
- "return without protest," 201.
- waiver of statutory diligence, 201.
- "as per advice," 201.
- stipulations limiting amount of exchange or expenses assumed, 201.
- American statutes on this point, 201 n.
- recitals for collateral security, 202.
- with power of attorney, 202.
- containing nonnegotiable provisions, 202.
- agreement to pay a deficiency, 202.
- agreement for collaterals confined to original holders, 202.
- recitals relating to the consideration, 203.
- not a note, if recital is in nature of executory agreement, 203.
- executed agreement does not affect its negotiability, 203.
- as to the manner of payment does not affect its negotiability, 204.
- property not to pass until payment, 204, 93.
- payment in installments, 204.
- extension at option, 204.
- on breach of conditions, 204.
- stipulation for attorney's fees, 205, 207.
- warrant to confess judgment, 207.
- how far it affects negotiability, 207.
- waiver of appraisalment and exemption laws, 201, 207, 208.
- effect of a power in a note to issue execution, 207.
- additional stipulations in note, 208.
- by contemporaneous writing distinct from note, 190, 208.
- avoids indorsement by foreign statutes, 714.
- and see "Attorneys' Fees"; "Collateral Security"; "Consideration."

ADMINISTRATOR,

- cannot bind the estate by giving his note or bill, 438.
- binds estate by promise in consideration of assets in his hands, 438.
- consent to alteration, 1772.
- judgment in such case should be against him de bonis testatoris, 438.
- not beyond the amount of assets actually received by him, 439.
- personal liability on a note or bill, 439.
- though for benefit of the estate, 439.
- "for value received by A. (the estate) and his heirs," 439.
- as payee, may sue in his own name, 440.
- or in his representative capacity, 440.
- administrator de bonis non may sue, 440.
- note payable to A. as administrator is notice of its character, 440.
- may transfer the personal property of the deceased, 441.
- and note taken in payment of property sold, 441.
- such note to a distributee of the estate for his share, 441.
- on death of holder, the right to transfer passes to his, 441.
- indorsement by him as effectual as if made by deceased payee, 441.
- may indorse a note of testator to complete transfer by testator, 442.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ADMINISTRATOR—Continued.

may be compelled in equity to make such indorsement, 442.
execution of note or bill by, 134, 171 n.
title added to acceptor's signature, 439, 623.
does not qualify his liability, 439.
especially when the estate is not particularly designated, 439.
administrator of partner liable on joint and several note of partnership,
425.
see "Action"; "Executor"; "Name."

ADMISSIONS,

see "Evidence."

ADVANCEMENT,

taking a note by way of, is not a bona fide holder, 991.

ADVICE,

"as per advice" in bill does not affect negotiability, 201.

AFTER SIGHT, 1029, 1035.

presentment for acceptance necessary, 16.
equivalent to demand, 109.
so, "after acceptance," 1035.

AGENTS,

appointment of:

may be by parol, 353.
for a corporation, 353.
not sufficient for sealed note, 353.
authority by joint principals, 354.
extends to joint paper only, 354.
partner may authorize clerk to accept or indorse in firm name, 354.

husband and wife:

for one another, 318.
wife as agent for husband, 318.
holder must prove authority, 318.
authority may be implied, 318.
is a question for jury, 318.
general power includes what, 318.
ratification by husband, 318.

by express authority, 356.

principal not bound beyond, 356.
is strictly construed, 357.
no verbal restriction, 353.
verbal enlargement, 362.
various phrases construed, 357-360.
power to discount not to pledge, 361.
nor to renew, 361.
power to make note not power to alter, 361.
to pay by draft not power to make note, 360.
to draw includes to indorse, 365.
to indorse includes to waive demand, etc., 1361.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

AGENTS—Continued.

- want of authority as a defense, 386-392, 1886.
- power to give a check will not include a bill, 360.
- or a postdated check, 360.
- a general power does not include accommodation paper, 361.
- nor joint note with another, 354.
- authority need not be express, 362.
 - statutes may require, 356 n.
 - authority implied from declarations and conduct, 362.
 - may be presumed, 362 n.
 - corporation may be bound by, 362.
 - English statute, 362.
 - in Louisiana an express power is necessary, 362.
 - acts and declarations of agent alone are insufficient, 362.
 - admissible with other evidence, 362.
 - proof of authority, 393.
 - burden of proof, 393.
 - if given by agent in principal's business, 362.
 - may be inferred from custom of principal, 362.
 - question for the jury, 362.
 - if by parol, may be shown by the testimony of the agent, 362.
- authority implied from recognition of similar acts by the principal, 362, 363.
 - cannot be implied merely from a power to purchase goods, 364.
 - nor from an acceptance of a draft with the drawer's name blank, 364.
 - may be implied from principal's knowledge of the transaction, 364.
 - authority to receive payment may be implied from possession, 364.
 - not conclusive as against bona fide holder, 391.
 - not from possession of an unindorsed note, 364.
 - and not authority to transfer, 364.
 - from naming as place of payment, 125, 1451.
 - from collection of interest, 364.
 - authority may be shown from the custom of banks, 365.
 - from relation of parties; e. g. cashier, partner, etc., 365.
 - from presence of principal, 353.
 - from authority to purchase on credit, 353.
- authority implied from official employment, 366.
 - a general agent has authority, 366.
 - so has a factor, 366.
 - though expressly forbidden in his instructions, 366.
 - a managing agent of a firm has not, 366.
 - nor the manager of a store, 366, 363.
 - nor master of a vessel, 366.
 - nor supercargo of a vessel, 366.
 - nor merchant's clerk, 366.
 - nor auctioneer's clerk, 366.
 - nor clerk of a steamboat, 366.
 - nor purchasing agent of a carriage factory, 366.
 - attorney receiving note for collection has no authority to transfer, 366.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

AGENTS—Continued.

- nor collecting agents, 366, 1450.
- to fill blank indorsement, 1450.
- or extend time, 1450.
- corporate authority implied, 367.
 - from charter, by-laws, etc., 367.
 - may contain restriction, 367.
 - from benefits received, 368.
- corporation officers, 368-371.
 - minutes as evidence, 368.
 - acts of, bind the corporation within their official scope, 368.
 - not necessary that agent's acts be performed at company's office, 368 n.
 - an indorsement by, is prima facie the act of the corporation, 368, 362 n.
 - president may indorse, etc., 368, 369.
 - not to himself, 368.
 - so, a cashier, 368-370.
 - may give certificate of deposit, 365.
 - president may certify a check, 368.
 - cannot pledge to himself, 368.
 - though not one drawn individually by himself, 368.
 - authority from the directors, 368.
 - they act as a body, 368, 372.
 - various corporate officers, 370, 371.
 - see "Cashier"; "President"; "Secretary"; "Teller"; "Treasurer."
- municipal officers, 372.
 - no power to give receipt showing note to be mere memorandum, 369.
 - no power to release or surrender, 369.
- authority implied from blanks, 373.
 - the holder is the agent of the maker to fill, 373.
 - blank note by agent in principal's name, 373.
 - revoked by death of the principal, 373.
- execution by, 131 et seq., 146.
 - American statutes, 352.
 - foreign statutes, 146.
 - principal's name should appear, 131.
 - otherwise, agent is individually liable, 131.
 - bill on principal accepted by agent binds principal, 131 n.
 - authority to agent, no discharge from individual liability, 131.
 - even though principal may have been disclosed, 131.
 - though direction added to charge to account of principal, 131, 140.
 - when in his business, principal liable for original consideration, 131.
 - by recitals of consideration moving to the principal, 141.
 - when estopped from denying agent's acts, 141.
 - benefit to principal is not sufficient of itself, 141.
 - parol evidence is admissible to disclose principal, 140, 147, 1897 n.
 - but not for the purpose of discharging an agent, 147, 1897 n.
- execution by public officers, 132.
 - public officers not individually liable, 132, 351, 381.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

AGENTS—Continued.

- death terminates, 377, 572.
- but not in South Carolina, 352.
- nor as to blank to be filled, 373.
- by outbreak of war, 251, 377.
- delivery by agent after principal's death, 377.
- notice of limit of agent's authority, 388.
- individual liability of, 378-380.
 - not, if with authority, but contract ultra vires, 378.
 - liable if he exceeds his authority, 378.
 - for the whole amount due, 378.
 - want of authority must affirmatively appear, 378.
 - liability not confined to the instrument, 379.
 - for sealed note executed without authority, 379.
 - not if agent known to be such, 380.
 - or if in principal's name, 380.
 - as "A. B., attorney for C. D.," 380.
 - trustees, note without authority, describing themselves as such, 380.
 - on note or bill in principal's name, liable only for damages proved, 380.
 - not if authority ended by unknown death of principal, 380.
- drawer agent of drawee or payee, indorser of indorsee, 382-384.
 - where agent draws on principal, principal not liable as drawer, 382.
 - though agency of drawer not expressed, 382.
 - agent liable as drawer to payee and subsequent parties, 382.
 - though known by them to be acting as agent merely, 382.
 - liability to payee, where the drawer is payee's agent, 383.
 - and uses a fictitious name, 383.
 - transfer by agent as indorser to principal, 384.
 - unless he restricts his liability, 384.
 - not liable, if made merely for remittance and by principal's order, 384.
 - for its loss when being transmitted by mail, 384.
 - if directed to make remittance on "good house," and house proves otherwise, he will be liable to the principal, 384.
 - consideration necessary to agent's liability as guarantor to principal, 384.
 - as well as an express undertaking on agent's part, 384.
 - liable on a del credere commission, 384.
- liability of, for negligence or fraud, 385, 1441.
 - to obtain discount, misapplying the proceeds, 385.
 - for money had and received, 385.
 - not in trover for bill misapplied, 385.
 - illegality of note no defense, 385.
 - negligence in collecting, 1457-1459.
 - for default of subagent, 1078, 1457, 1458.
- general principles:
 - holder of note cannot be maker's agent to bar statute of limitations, 385.
 - corporation cannot give a valid note to its acting trustee, 385.
 - payee may act as agent for maker in signing in his presence, 385 n.

71; vol. 3, §§ 1392-1904.]

asurer for money em-

1.

d, 774.

3, 774.

317.

ting
ee's

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

ALIENS AND ALIEN ENEMIES—Continued.

- payee or indorsee an alien enemy, 255.
- indorsement between, 255.
- delivering under indorsement by alien enemy, 255.
- a subsequent promise to pay is valid, 255.
- a note may be given after the war for debt created during the war, 255.
- a payment to an alien enemy cannot be questioned by himself, 255.

ALLONGE,

- what is an, 13.
- indorsement may be on an, 701.
- foreign statutes, 713.

ALLOW,

- "I allow to give," not equivalent to a promise, 87.

ALTERATION,

- discharges parties, if material, 1742, 1763.
- and without consent, 1742.
- although without fraud, 1742.
- not, if immaterial, 1743, 1763.
- mistake a question of fact, 1765.
- fraud a question of fact, 1763.
- materiality a question of law, 1744.
 - party altered by addition, 149, 1744-1746.
 - addition to signature, 133, 1747.
 - erasure, 1748, 1749.
 - contract altered as to promise, 1751.
 - condition, 1752, 1888.
 - guaranty, 1751.
 - waiver of demand, 1751.
 - amount, 187, 194, 1754.
 - marginal figures, 105 n, 187, 194, 1754.
 - date, 84, 210, 1757.
 - maturity, 1758.
 - as to place of payment, 626, 1759, 1768.
 - medium of payment, 98, 1755.
 - seal, 70, 1761.
 - attestation, 1761.
 - added after execution, 68.
 - negotiable words, 174 n., 655, 1750, 1768.
 - interest, 195, 1756.
 - receipt for interest, 1756.
 - exchange, 1754.
 - attorney's fees, 1754.
 - memorandum, 123 n., 187, 194, 1760.
 - collateral, 1760.
 - stamp, 1762.
 - number, 105 n., 1762.
 - crossing of check, 1483, 1750.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

AMERICAN STATUTES,

- acceptance by drawer, 501.
 - to be in writing, 605.
 - by telegram, 606.
 - acceptor's signature, 606.
 - unconditional promise to accept, 612.
 - an undrawn bill, 614, 616.
 - time allowed for an acceptance, 620.
 - if conditional, may be refused, 621.
 - acceptance payable out of a certain fund, 622.
 - admits signature of the drawer, 629.
 - revocation of acceptance, 637.
 - acceptance supra protest, 1188.
- acknowledgment of indebtedness, note is, 88.
- action, by whom, 1631.
 - by initials, 1631.
 - by indorsee, 738.
 - jurisdiction of the United States courts, 74, 1637.
 - by assignee in his own name, 1639.
 - by administrator on note indorsed to deceased, 1642.
 - against several parties, 1661.
 - joint makers liable severally, 1666.
 - against surviving joint debtor, 1668.
 - joint action against several parties, 1669, 1670.
 - death of one joint maker, 1832.
 - insolvency of one joint maker, 1833.
 - costs incurred in other, recovery of, 1718.
- assignment, pleading to aver consideration for, 1726 n.
- attachment, 812.
- attestation of notes, 68.
- attorney's fees, 205 n, 1718.
- bank to receive its own notes in payment of debts, 1404.
- bank liable to bona fide holder of its notes raised in circulation, 1764.
- banking acts, 518, 1402.
 - state, 331, 332.
 - national, 331, 332.
- bankrupt acts, United States, 509.
- blanks, 189.
- bona fide holder, definition of, 986.
 - effect of suspicious circumstances, 997.
 - partial failure of consideration as against, 557 n.
 - presumptions of, 1024.
 - gaming as a defense against, 1787.
- calendar, Illinois statute as to, 1030.
- Confederate currency, 1399.
- "scaling acts," 1735-1737.
- consideration, partial failure of, as a defense, 540, 557 n.
 - failure, 1887.
 - must be returned on disaffirmance by infant, 277.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

AMERICAN STATUTES—Continued.

- costs in other suit, 1718.
- damages in lieu of exchange, 1720.
- date, 75.
 - presumption from blank indorsement, 686.
- deceased payee, 150 n.
 - principal's estate, claims against, 939.
- defense against purchaser after maturity, 1879, 1881.
 - bona fide holder, 1885, 1890, 1893.
 - intermediate holder, 1879.
 - before notice of transfer, 1881.
 - on nonnegotiable paper, 1884.
- delivery, transfer by, 654, 696.
 - of bill or note to bearer, 159, 160.
 - to "A., or bearer," 160, 654.
- demand note subject to defense in Massachusetts, 404.
- diligence against maker, 762-765.
- duebills are promissory notes, 88.
- estoppel, not by promise without knowledge, 1871 n.
- exchange, adding words of, etc., 201 n.
 - providing as to, 1715.
- execution, 826.
 - of bills and notes by agents, 352.
- executor, appointment of debtor as, 1397.
- fictitious payee equivalent to bearer, 163.
- foreign and inland bills, 236.
- fraud against bona fide holder, 1893.
- gaming as defense against bona fide holder, 1787.
- grace, 1060, 1063-1065.
- guaranty, 870.
- holidays, 1031, 1032.
- illegality void by statute, 1889.
- indorsee, right of to sue, 738.
 - of demand note, defenses against, 404.
- indorsement, 703.
 - "without recourse," 724.
 - restrictive, 724.
 - irregular, 836, 838, 839.
 - liability to payee, 844.
 - of note to "A., or bearer," 175.
 - blank, 188, 189.
- infant, liable for false representations as to his age, 272.
 - ratification requires writing, 276.
 - disaffirmance requires return of consideration, 277.
- interest, 1704.
 - application of payments to, 1497.
 - compound, 1706 n.
 - from maturity, 1709, 1712, 1713.
 - on demand notes, 1710.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

AMERICAN STATUTES—Continued.

- joint maker, death, 1832.
- insolvency, 1833.
- legal tender, 98.
- limitations, statute of, 1595, 1601, 1602.
 - in favor of nonresident plaintiffs, 1611.
 - and defendants, 1611.
 - suspended by war, 1610.
 - barred by acknowledgment of debt, 1616.
 - by joint maker, 1618.
 - indorsement of payment, 1625.
- lost bill or note, notice of loss, 1691.
 - indemnity necessary, 1693.
 - when new bill required, 1695.
 - action at law upon, 1699.
 - proof of contents of, 1703.
- married women, transfer by husband or wife by insolvent assignment, 322.
 - wife's property, when liable for husband's debts, 323.
 - note to wife prima facie her separate property, 323.
 - if not reduced to possession, choses in action go to next of kin, 326.
 - reduction to possession abolished in New Jersey, 326.
 - liability, 279, 280.
 - on bill or note, 283, 291.
 - on her indorsement, 288, 306.
 - as surety, 289.
 - as sole trader, 299.
 - suit by wife against husband, 316.
- maturity of demand note, 117, 1044.
- negotiability of bills, notes, and bonds, 651.
 - conditions affecting, 92 n.
 - as affected by "without defalcation or discount," 86.
 - of sealed bills, 71.
 - certificates of deposit, 89 n.
 - warehouseman's receipts, 89 n., 90 n.
 - receipts, 90 n.
- negotiable words, 174.
- notice of dishonor, 759, 1075, 1076, 1212-1216.
 - default to guarantor, 886.
- offices, sale allowed in Vermont, 498.
- offset against bankrupt, 1856.
- payable to maker's order liable as if payable to bearer, 153.
 - in money or property, 96 n.
 - in goods or merchandise, 96 n.
 - amount, must be certain, 106.
 - restriction as to, 106.
- payee's name, 169.
 - deceased person, 150 n.
 - fictitious, 163.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

AMERICAN STATUTES—Continued.

“value received,” 178, 180.
Virginia coupons, 1405, 1406.
wages, 511.
writing, note or bill must be in, 60.
ratification must be in, 276.
see “Appendix I.”

AMOUNT.

must be certain, 104, 106.
sufficient if the amount can be ascertained, 104.
“with interest,” is not uncertain, 104.
nor “with current exchange on B.,” 104.
counsel fees, 104 n.
marginal figures, differing from amount in body, 105.
foreign statutes as to figures and blanks, 105.
may be expressed either in words or figures, 105.
filling blanks left for the, 105, 187.
limited, in England, by the stamp, 105, 187.
may be limited by marginal figures, 187.
against bona fide holder filled with greater amount, 105, 187.
blank raises no presumption against the bona fides of holder, 187.
marginal figures alone insufficient, in Iowa, to support a recovery, 194 n.
alteration discharges surety, 187, 194, 1754.
may be designated in any currency, 106.
“sterling,” “currency,” “dollars,” “pounds,” “shillings,” etc., 96 et seq., 106.
mistake in the, may be corrected or set up in defense, 106.
cannot be varied by parol evidence, 106.
fraud or mistake may be shown by parol, 106.

ANTEDATING,

effect of, 76, 79, 186.
blank date cannot be antedated, 186.
invalid for fraud, 79.
may be shown by parol evidence, 79.
may be ratified, 79 n.
statute of limitations runs from delivery, and not from date, 85.

APPRAISEMENT AND EXEMPTION LAWS,

waiver of, in note or bill, 207.

“AS,”

execution of note or bill by agent “as” such, 136 n., 144.

“ASSIGNED,”

in pleading, 773.
not equivalent to “assigned by indorsement,” 773.

ASSIGNEE,

note made payable to, and so indorsed, 134, 158.
may present, 1080.
may receive notice of dishonor, 1243.
may receive payment, 1447.
may sue, 791, 1639, 1640.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ASSIGNMENT,

- distinguished from indorsement, 786, 989, 1662.
- validity determined by the *lex loci contractus*, 48, 820.
- authority to assign, not a power to transfer as collateral for individual debt, 361.
- of partnership assets for benefit of creditors, 434.
- assignment in bankruptcy by husband as transfer of note to wife, 322.
- assignment of her note as collateral will not defeat her survivorship, 322.
- note to wife transferred by joint assignment of husband and wife, 322.
- check is not an assignment of the fund drawn on, 643, 644, 1664, 605 n.
- unaccepted bill of exchange is not an assignment of the fund, 589.
- bill drawn against funds in hands of agent and accepted is an, 589, 628.
- of choses in action, 650.
- of judgment on note, 748.
- equitable, when, 655, 1664 n.
- delivery essential to an, 689.
- indorsed on a negotiable instrument, 704.
- of written instruments must be dated, in Arkansas, 704.
- of note, effect on attaching creditor, 729.
- of duebill, 787.
- of municipal bonds which are unconstitutional, 730.
- not governed by the law merchant in Indiana, 745.
- warrants validity of the instrument, 757, 757a.
 - capacity of prior parties, 757.
 - proper stamp, 757a.
 - sufficiency of the consideration, 757a.
 - delivery without indorsement warrants solvency, 748.
 - good faith, 751.
 - genuineness, 753.
 - title, 755.
- transfer by, 785 et seq.
- a guaranty by letter of "A.'s accounts" in your favor is assignable, 861.
- payee's indorsement in blank on a sealed note is an, and not a guaranty, 866.
- holder's assent to an, made by a co-surety, 950.
- surety paying debt is entitled to an, of all securities which creditor holds, 984, 985.
- without indorsement, 687.
 - is subject to defenses, 788.
 - not subject to fresh equities arising after notice to the drawer of such, 788.
 - insufficient to constitute a bona fide holder, 789.
 - reciting a valuable consideration executed on a separate paper without indorsement, 789.
 - an imperfect assignment is not a good *donatio causa mortis*, 806.
 - bond held by donor passes by delivery as a *causa mortis* without writing, 810.
 - waives demand and notice of dishonor, 1345.
 - see "Transfer."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ASSIGNOR,

one who indorses a note, not a party to it, is *prima facie* an, in **Kentucky**, 836.

not entitled to notice of dishonor, 760.

"ASSIGNS,"

equivalent to "or order," and renders a note negotiable, 174.

effect on negotiability of sealed bond, 174 n.

effect of, on bill or note, 652.

"AT HIS OWN RISK,"

a special indorsement; the indorser is not liable on, 176.

"AT NINETY DAYS,"

equivalent to ninety days after sight, 852.

"AT SIGHT,"

mature when presented, 16, 1029.

equivalent to demand, 109.

entitled to notice of dishonor, 1200.

see "On Demand."

ATTACHMENT,

against husband, as affecting note of wife, 322, 323.

transfer by, 811 et seq.

negotiable paper subject to, 729, 811, 813, 814.

gives rise to questions of conflict of local laws, 811.

place of delivery, and not of signing the note, is the place of contract, 811.

lies against maker's or indorser's liability, 743, 816.

in California, taking collateral waives right to proceed by, 799.

collateral note subject to, 802.

pledgor's equity, 795 n.

maker holding for payee, 816.

American statutes, 812.

bank notes, bills, checks, 815.

garnishment of maker, 816.

answer of garnishee, 818.

as a defense, 818 n.

prior transfer, 819.

and notice of transfer, 820.

law of Vermont, 821.

law of Maine, 816.

bona fide holder, 822.

nonnegotiable paper is subject to, 824.

in Virginia a guarantor may have an, against his principal, before actual payment of the debt, 862.

not necessary to proceed by, against maker of note, to hold a guarantor, 891.

discontinuance of an, against principal, does not discharge surety, 923, 945.

surety not discharged by, against principal's property, 945.

payment to attaching creditor, 1466.

suspended by taking bill, 1570.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

B**"BACKER,"**

not a waiver of demand and notice, 1358.

BAD FAITH,

see "Bona Fide Holder."

BANK,

execution of note or bill by, 133, 370.

payable to its "cashier," 133.

indorsement by the cashier, as "A. B., cashier," 133.

bank is liable on such indorsement, 133.

powers under national banking act, 331, 332.

state banking acts, 332.

savings banks, 332.

Bank of England, 332.

officers, 370, 371.

cashier, 370.

teller, 371.

guarantying a note to be made payable at, 852.

taking note as a collecting agent is not a bona fide holder, 986.

indorsement by, should be made by duly-authorized officer, 988.

discounting drafts with forged bills of lading attached, 1000.

not bound to greater care in purchasing negotiable paper than individuals, 1000.

bound by knowledge of its cashier, 1004.

or of a director, 1004.

as collecting agent, 1106, 1119, 1441.

negligence, 1237.

negotiable at, 1110, 1118.

demand at, 1115, 1116, 1134.

deposit does not make it holder's agent, 1442.

naming as place of payment, 1451.

see "Cashier"; "President"; "Teller."

BANK BILLS,

see "Bank Notes."

BANK DEPOSITS,

applicable to note, 1393.

no lien before maturity, 1441.

banker's lien, 1854.

as set-off, 1854.

BANKING HOURS, 1092, 1093.

see "Presentment."

BANK NOTES,

defined, 9.

circulate as money, 9.

are not "securities," but money, 9 n.

the right to issue in most countries is restricted by statute, 9.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

BANK NOTES—Continued.

a certificate of deposit "payable in current bank bills," 90.
paper payable in, 100.
are not money, 100 n.
statute of limitations runs from demand, not from date, 85 n., 1597.
delivery warrants the solvency of bank at that time, 749.
payment by notes of bank which has failed, 749, 750.
implies that they are genuine, 754.
may be the subject of a gift causa mortis, 809.
subject to attachment, 815.
not subject to execution at common law, 825, 827, 828.
otherwise now by St. 1 & 2 Vict., 825.
presentment for payment, 1107, 1131.
payment in bank notes, 1402, 1403.
to agent, 1455.
available as a set-off, 1404, 1853.
against receiver of bank, 1853.

BANKRUPT,

cannot take bill or note by indorsement before discharge, 247.
note to bankrupt factor, 156 n.
if transferred before petition, he may afterwards indorse, 247.
and in such case the court may direct his assignee to complete the transfer, 247.
check drawn before assignment, but not presented until afterwards, will not transfer the fund, 247.
may draw on his own check, 247.
transfer by a, 247.
surviving partner being a bankrupt, an action may be maintained against the executor of the deceased partner, 425.
presentment to, 1086.
notice of dishonor to, 1243.
payment to assignee of, 1447.
damages reduced by dividend, 1730.
set-off against, 1856.

BANKRUPTCY,

dissolution of firm by, 437.
effect of acceptance by solvent partner, 435.
of principal does not discharge surety, 950.
of maker, effect on indorser, 1833 n.
effect as to indorser paying note, 1833.
no excuse for demand or notice, 1329, 1330.
stops interest, 1711.
effect of discharge, 1833.
of composition, 1834.
waiver of discharge, 1833.
foreign discharge, 57, 1833.
see "Insolvency."
RAND.C.P.—181

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

BEARER,

- designates holder, 14, 150, 159.
- when necessary to negotiability, 174.
- American statutes, 174.
- foreign statutes, 174.
- is negotiable by delivery, 90 n., 159, 160, 175.
- or by indorsement, 159, 160.
- interest coupons payable to, are negotiable, 91, 159.
- railroad bonds payable to, 159.
- action by bearer, 150, 159, 1648, 1650.
- original bearer is subject to defenses as if named as payee, 159.
- the holder is presumed to be a holder for value, 159.
- and lawful owner, 160, 391.
- a note payable to a fictitious person is equivalent to, 161.
- see "A. B., Bearer"; "A. B., or Bearer"; "Delivery"; "Payee's Name."

BILL OF CREDIT,

- what is, 349.
- constitution of the United States prohibits the states from issuing, 349.

BILL OF EXCHANGE,

- defined, 3.
- form, 3 n.
- origin, 232.
- an order indorsed on a bond or note is equivalent to a, 86.
- an indorsement is equivalent to a, 234.
- American statutes, 236.
- see "Foreign Bills"; "Inland Bills."

"BILLS PAYABLE,"

- a note or bill payable to, 161.

BLANKS,

- authority to fill, in what manner, 181, 182, 373.
- presumed, 1768, 1769.
- but only from voluntary delivery, 181.
- incomplete until filled, 183.
- unless payable "to —, or bearer," 160.
- when blank must be filled, 167, 181 n., 183.
- filling relates back to the time of delivery, 183.
- authority to fill ends at maker's death, 183, 373.
- after partner's death, 423, 431.
- after dissolution of firm, 183.
- after partner's insanity, 183.
- after acceptor's death, 612 n.
- after transfer, 612 n.
- bill delivered in Bavaria, with blanks filled in London, is foreign bill, 183.
- sealed instruments, 74 n., 168, 184.
- coupon bonds, 184.
- as authority for alteration, 1768, 1769.
- mistake, 186.
- payee's name, 74 n., 167, 995.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

BONA FIDE HOLDER—Continued.

- receiver, 990.
- assignee in bankruptcy or insolvency, 990.
- trustee for collection, 990.
- holder of municipal warrant, 337, 389.
- purchaser from drawer (as to acceptor), 990, 995.
- of assets in lump, 990 n.
- usual course of business, 988, 989.
- delivery necessary, 722.
- indorsement necessary, 988, 989.
- sufficient though "without recourse," 1008.
- or "for collection," 726, 986, 1008.
- assignment not sufficient, 989.
- partner's indorsement to firm, 411.
- in fictitious name used by payee, 407 n.
- notwithstanding other indorsement by a third party, 845.
- discounting, 449.
- see "Indorsement."
- before maturity, 986, 988.
- with notarial marks, 1006.
- with overdue coupons, 1007.
- or interest, 1007, 1048.
- check transferred six months after date, 1006.
- one day after date, 1045.
- paper apparently overdue, 1006, 1034.
- payable one day after date, 1034.
- collateral overdue and foreclosed, 1006.
- pledgee for advances made before maturity only, 1006.
- called bonds, after option by government, 1006.
- see "Maturity."
- for value, 452, 986, 987.
- consideration immaterial, if purchased from bona fide holder for value.
- 987.
- adequacy, 448, 560, 567, 991, 992, 996.
- purchaser at discount, 452, 991, 998.
- usury in purchase, 992 n.
- as collateral for fluctuating balances, 457.
- pledgee, 560, 797, 799, 993.
- for indemnity, 994.
- notwithstanding other sufficient collateral, 993.
- pro tanto, only, 994, 995, 797 n.
- donee takes donor's title, 991 n.
- for existing debt, 461-465, 995.
- as collateral, 462 n., 465, 794 n., 995.
- and extension, 462, 995.
- credit on overdrawn account, 994.
- as deposit in bank account, 457, 994.
- collateral for balance, 457.
- or for contemporaneous loan, 456.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

BONA FIDE HOLDER—Continued.

from character of parties, 999, 1000, 1022.
from previous dealings, 1000.
evidence, 1000.
question of fact, 1000.
relation of parties, 1014.
sister purchasing from drawer with payee blank, 995.
postdated, 1007.
notarial or bank marks, 1006.
interest or coupons overdue, 1007.
restrictive indorsements, 1008.
memorandum as to security, 1009.
as to waiver of protest, 1009.
for collection, 1009.
as to application of proceeds, 1009.
memorandum as to, for collateral, 1011.
"mem.," 1011.
memoranda in general, 1011-1013.
usury apparent, 1011, 1009.
alternative place of payment, 1013.
different numbers by bank and maker, 1013.
payable to maker's order, 1014.
by corporation to its officer, 1014.
indorsement to one of two makers, 1014.
execution by partner and firm, 1014.
erasures, 1011.
paper torn or repaired, 1012.
lis pendens, 1023.
advertisement in newspapers, etc., 1023.
public rumor, 1023.
statutory powers of corporation, 343, 1016.
recitals, 345 et seq., 1017.
notice of condition and breach, 1018, 1020.
of character of consideration, 1018, 1019.
accommodation, 1020.
by corporation, 472.
by partnership, 472.
gross inadequacy, 1019 n.
of failure of consideration, 556, 1019.
by recital of consideration, 538, 1018.
that indorser held as collateral, 1019.
or by gift, 1019.
that acceptance has been refused, 669.
of fraud, 1021, 1022.
of payment, 1022.
of discount refused, 1022.
of collateral withheld in transfer, 1021.
or held adversely, 1023.
notice to executor, 1002.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

C**CALENDAR,**

month, 1029, 1030.
year, 1029, 1030.

CANCELLATION,

incomplete cancellation at suit of bona fide holder, 217.
as a release, 1841.
of an acceptance, 637, 638.
procured in equity, 800, 1686.

CAPACITY,

in general governed by the *lex loci contractus*, 35.
civil restrictions, 244 et seq.
all persons who can contract can become parties to commercial paper, 244.
want of capacity may be either natural, legal, or political, 244.
making of a note admits the payee's capacity to receive it, 244.
so the drawing of a bill, 244.
likewise his capacity to indorse it, 244, 271.
acceptance admits drawer's capacity, 244.
indorser cannot question capacity of subsequent indorsee to receive and hold, 244.
making admits incorporation of payee, 244 n.
formerly merchants only were capable of contract under mercantile law. 245.
foreign statutes, 245.
clergy, soldiers, and farmers, 246.
felons and bankrupts, 247.
admissibility of defense, 1886.
surety cannot set up principal's incapacity, 915.
see "Administrators"; "Agents"; "Allens and Allen Enemies"; "Corporations"; "Defense"; "Drunkards"; "Executors"; "Governments"; "Guardians"; "Idiots"; "Infants"; "Lunatics"; "Married Women"; "Municipal Corporations"; "Partners and Partnership"; "Trustees."

CASHIER,

synonymous with the bank, 157.
bank may sue without indorsement on note payable to, 133, 157.
suit may be brought by the cashier in his name, 157 n.
or by his successor, 157 n.
parol evidence admissible to show the bank intended as payee, 157.
may certify checks, 371.
may execute notes, etc., for bank, 370, 375.
may transfer bank's negotiable securities by indorsement, 398.
may forward its paper for collection, 370.
may bind bank by his certificate of deposit, 370.
or by certifying check, 370.
no power to give accommodation indorsements in bank's name, 370.
nor to indorse note made payable to it, but discounted by other party, 370.
may sell bill of exchange, and warrant that it is "perfectly safe," 370.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

CERTIFIED CHECKS—Continued.

other officers, 649.
and if there are no funds, bank will be liable to bona fide holder, 370.
takes effect when redelivered to holder, 216, 647.
statute of limitations applies, 646.
statute of frauds, 648.
national bank act, 642 n.
payment under forged indorsement is not, 646.
agreement to pay is not, 648.
unless relied on, 648.
may render liable to drawer, not holder, 648.
liability of bank, 646, 645.
if check forged, 666.
if procured by fraud, 646.
not liable before certifying, 643, 644.
revocation, 647.
effect of certification on prior parties, 645.

CHECKS,

defined, 8.
presupposes funds of drawer in hands of drawee, 8.
in form that of an inland bill, 8.
acceptance, 8.
is usually payable forthwith, 80.
postdated, 80, 1045.
after drawer's death, 80.
cannot be transferred "in due course," 1007.
dated on Sunday, 1045, 1090.
in England, it should be stamped, 80.
is not entitled to grace, 80, 1060.
space negligently left for amount, 187 n.
English and American stamp acts, 209.
not subject to attachment, 815.
when collected the proceeds are, 815.
irrevocable after transfer, 644 n.
subject to execution under St. 1 & 2 Vict., 825 n.
do not require presentment for acceptance, 568.
unless made payable at a future day, 568.
then they are equivalent to bills of exchange, 568.
not an assignment of the drawer's fund in the bank, 644.
unless certified, 644 n.
checks as subjects of gift causa mortis, 810.
revoked by death of donor, 810.
distinguished from a time draft, 645.
payment to order without indorsement, 787.
maturity of, 1045.
statute of limitations runs from date, if no funds, 1045.
from demand, 1598, 646.
"mem." check, 1045.
drawer discharged by certification, 645.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

COLLATERAL SECURITY—Continued.

- discharge of guaranty, 771.
- statute of limitations runs against, 1600.
- is barred by payment on, 1622.
- release of bill releases collateral, 1843.
- holder taking from principal, effect on surety, 943, 961.
- giving up, discharges surety, 951.
- misuse of, discharges surety, 952.
- surety entitled to credits on, 1675.
- surety's right of subrogation extends to, 983, 1675.
- right of contribution extends to, 975.
- notice in, as affecting a bona fide holder, 1023.
- application among several notes secured, 1675.
- attachment as property of pledgor, 795 n.
- power to collect collateral:
 - pledgee takes it as trustee for holder, 795.
 - duty to collect it at its maturity, 731, 795, 1677, 1678.
 - when collected may apply proceeds to payment of debt secured, 795, 1506.
 - need not defer collection until maturity of original debt, 795, 1677.
 - operates as a payment pro tanto of debt secured, 795.
 - payment to pledgor will not satisfy note, 795.
 - on maturity of, may be collected by suit, 733, 796, 802, 1675, 1677.
 - holding note of pledgor is no bar to recovery against indorsers, 796.
 - not necessary to join the pledgor as a party, 796.
 - notice to sue by indorser or surety should be given to the pledgee, 796.
 - suit may be brought in name of pledgee or pledgor, 796.
 - pledgee may continue action after payment of amount due him, 796.
 - and recover judgment for the full amount, 796.
 - judgment on note not satisfied is no bar to suit on collateral, 796.
 - holding of collateral no defense in an action upon original debt, 796, 799.
 - pledgor paying off debts secured may sue on note, 796.
 - such action will not be restrained, 796.
 - though pledgee with full notice has begun a second action, 796.
 - subject to equities, 731, 799, 1878, 1884.
 - effect on set-off, 1865.
- amount of recovery by pledgee:
 - full amount of the collateral, 797.
 - holding the balance in trust for the pledgor, 797.
 - to extent of debt due him as a bona fide holder, 797.
 - accommodation paper, 474, 797, 800.
 - fraudulently diverted from special purpose, 797
 - for shifting balances, 798.
- transfer by pledgee:
 - may be at common law, 801.
 - full power of sale implied by unrestricted indorsement, 801 n.
 - cannot be sold without a previous demand of debt, 801.
 - applied to municipal bonds and coupons, 801.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

COLLECTING AGENT—Continued.

negligence in not giving notice of dishonor, 1198, 1236, 1237.
 entitled to notice of dishonor, 758, 1241.
 must give notice of dishonor to his principal, 1241.
 one day for receiving and giving notice, 1262.
 money in hands of, when a payment, 1395.
 banks as, by designating them as place of payment, 1441.
 have power to receive payment, 1450.
 have no authority to sell or transfer paper, 1450.
 or to fill blank indorsement specially, 1450.
 or to extend time of payment, 1450.
 can receive payment only in money, 1454.
 negligence of subagents, 1078, 1457, 1458.
 insolvency of agent or subagent, 726.
 duty of, 1459.
 liability for negligence may be waived, 1459.
 measure of damages for negligence, 1461, 1732.
 see "Collection."

COLLECTION,

indorsement for collection is not transfer of title, 717, 726, 735.
 except in blank, as to bona fide holder, 735.
 is subject to defense, 726.
 is restrictive, 726.
 carries no power of sale, 726.
 insolvency of collecting agent, 726.
 indorsee is agent for the indorser, 726.
 may bring suit on the paper in his own name, 726, 735.
 does not destroy negotiability, 726.
 foreign statutes, 728.
 parol evidence to show an indorsement was made for, 780.
 guaranty of collection, 865.
 of payment, 887.
 indorsement "to make it good if it is not," 866.
 "if bearer fails to collect, I will be responsible," 867.
 diligence in prosecuting maker and indorsers, 887.
 holder of bill or note for, can agree to extend time for payment, 956.
 indorsement for, to constitute a bona fide holder, 726, 986, 1008.
 note in hands of agent for, is not subject to attachment against the owner.
 814.
 otherwise with the proceeds when collected and in the agent's hands, 814.
 819.
 notice of transfer may be given by the collecting agent of the indorsee, 821.
 see "Collecting Agent."

COMMERCIAL LAW,

is the *lex mercatoria* or common law of merchants, 1.
 is of more universal authority than the common law of England, 1.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

COMMERCIAL PAPER,

includes what, 1.

power of corporations to make, 328 et seq.

municipal corporations to make, 336 et seq.

see "Bills of Exchange"; "Foreign Bills"; "Inland Bills."

COMMISSIONERS,

as such are individually liable on drafts signed by them, 443.

COMMISSIONS,

when recoverable, 1717.

COMMON LAW,

presumption as to, 34.

COMPOSITION,

in bankruptcy, 1834.

COMPOUND INTEREST,

see "Interest."

CONDITION,

destroys negotiability, 92, 229, 723.

cannot be waived to give federal jurisdiction, 92.

what amounts to a, 92, 93.

American statutes, 92 n.

attorney's fees, 92 n., 93 n., 206, 206.

return of certificate, 93.

title not to pass until payment, 93, 204.

must be expressed, 94.

may be expressed in collateral mortgage, 94.

parol evidence of conditional promise, 94, 1901.

of conditional indorsement, 723.

of conditional delivery, 227, 231.

alteration by adding, 1752.

unconditional renewal not affected by condition in original note, 94.

performance of condition must be shown, 95, 1588, 1871.

excused by impossibility, 723.

what constitutes performance is a question of fact, 95, 229.

repugnant conditions, 95.

against transfer, 176, 723.

notice of condition, 1020.

available against holder with notice, 92 n.

acceptor bound by, 723.

surety affected by, 916, 917.

consent to extend on condition, 968.

as to maturity, 111, 112, 1049, 1050.

as to demand, 1089.

as to interest, 1704.

as to release, 1035.

contemporaneous memorandum is part of note, 191.

alteration of it avoids note, 191.

contemporaneous agreement for discontinuance of certain suit, 199.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

CONDITION—Continued.

delivery upon, no defense at suit of bona fide holder, 185, 227, 228, 1888.
subsequent condition, 229.
when payee knew of condition, relief given to surety in equity, 229.
implied from bill of lading attached to note, 229.
waived by indorsement of compromise, 229.
onus probandi, 1835.
in promise to bar statute of limitations, 1616.
fraudulent breach, 1802.
see "Acceptance"; "Indorsement."

CONFEDERATE CURRENCY,

as consideration for note, 460, 1788.
bill or note for loan made in, void, 497.
damages recoverable, 1735-1737.
see "Consideration."

CONFLICT OF LAWS,

the states are foreign to each other, 20.
interstate bills are foreign bills, 20.
drawing, acceptance, indorsement, etc., are distinct contracts, 20.
foreign decisions, how far binding, 37.
state decisions, how far binding on federal courts, 20.
lex loci contractus:
how ascertained, 22.
knowledge and intention presumed, 21.
place of contract shown by delivery, 22, 23.
by date, 24.
by landed security, 25.
by residence, 25.
by place of business, 30.
governs the liability of maker, 29.
of drawer, 29.
of acceptor, 29, 38.
of accommodation acceptor, 50.
of surety, 29, 38.
of indorser, 29, 38, 39.
controls the formalities of execution, 29, 36.
validity, 30, 40.
effect, 30, 37.
contract of the drawer, 38.
damage and interest, 38, 42, 1707, 1719.
exchange, 42, 1714, 1715.
indorsement, 35, 36, 38, 820.
capacity of parties, 35.
acceptance, 36.
discharge of surety, 936.
attachment, 811, 821.
lien, 1590.
necessity for stamp, 36.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

CONFLICT OF LAWS—Continued.

notice of dishonor, 32, 52.

discharge, 57.

time of notice, 1250.

authority of notary's clerk, 1055.

sufficiency of protest, 32.

what is the place of payment, 26.

parol evidence of special place inadmissible, if none expressed, 26.

lex loci rei sitæ:

as to usury, 33, 45.

lex domicilii, 28.

CONSIDERATION,

necessity for, 445 et seq.

contemporaneous indorsement, 445.

indorsement by stranger, 832, 843.

each signature a new contract requiring consideration, 445.

consent after alteration, 445, 1774.

waiver of protest, 445, 1148.

waiver of fraud, 445.

waiver of discharge by surety, 963, 969.

new promise to pay, 445.

agreement to accept, 614.

consideration of note sufficient for the indorsement, 445.

recovery by holder of coupons without consideration, 445.

guaranty, 446 n., 856.

guaranty by agent, 384.

promise to indorse after laches in demand, 1380.

new promise to pay lost note, 1692.

extension, 492, 964-967, 1822.

release, 1835, 1848.

waiver of discharge in bankruptcy, 1871.

indorsement by stranger after delivery, 446.

expression of:

how expressed, 15, 159, 178.

usually by the words "value received," 15, 178, 563.

recital in case of nonnegotiable note, 563.

recitals of consideration to principal, prima facie contract of principal,
141.

American statutes, 178.

foreign statutes, 179.

"value received" not necessary to negotiability, 180.

full expression of does not affect negotiability, 180, 203, 206.

should be averred in an assignment without recourse, 180.

want of may be shown, notwithstanding "value received," 180.

may show usury, notwithstanding the words, "value received," 180.

expression in memorandum, 195.

guaranty requires express consideration, 843, 875.

sufficient in note for guaranty in indorsement, 875.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

CONSIDERATION—Continued.

- credit on account is sufficient, 457.
- so, if given as collateral for a fluctuating balance, 457.
- accommodation paper, 15, 445.
- see "Accommodation Paper."
- surety's promise to pay is sufficient, for a note by principal to surety, 458.
- prior liability under disability of coverture, 293, 458.
- liability for interest not expressly reserved, 458.
- estimated liability, 458.
- future award of arbitrators, 458.
- surrender of other note, 459.
- so, payment of note by indorser, 459 n.
- consideration of original paper sufficient for renewal, 459, 460.
- for suretyship, 920.
- debt from one person as consideration for note by another, 466.
- note by executor for debt of deceased, 467.
- if there are assets in his hands it is sufficient, 467.
- debt of ancestor barred by statute of limitations, for note by heir, 467.
- widow not liable for debt of husband, 468.
- debt of third person with release of other security is sufficient, 470.
- surrender of a chattel mortgage is a sufficient, for an indorsement, 470 n.
- so is the surrender of notes, 470 n.
- renewal by a new firm of note given by old firm, 470.
- novation for third person's debt is a sufficient, 470.
- forbearance of third person's debt is a sufficient, 471.
- liability on accommodation paper, 472.
- for property purchased, 477.
- or rights in property acquired, 477.
- a mortgagee's right to redeem, 477 n.
- a quitclaim deed, 477.
- an ultra vires grant, 478.
- an improvement on property of a third person, 477, 478.
- for difference of exchanged lands, 477.
- sale of spirituous liquors, 477.
- policy of life insurance, 477.
- patented articles, 477.
- collateral for goods purchased and delivered, 477.
- good will in business, 477.
- membership fees in society, 477.
- void or illegal transfer of property is not sufficient, 478.
- exchange of notes or checks is a sufficient, 479.
- though rendered worthless by acceptor's subsequent insolvency, 480.
- other lawful agreements, 481.
- parol agreements, 1798.
- for services, 482.
- past services rendered gratuitously, 482, 483.
- future services not stipulated for as obligatory, 482.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

CONSIDERATION—Continued.

- for legal instruction, 482.
 - to cure a sick man by "conjuring," 482 n.
 - information, 482.
 - note to induce bank president to resign, 482.
 - when service has been already paid for, 482.
 - services as a lobbyist, 482.
 - release of liability is a sufficient, 483.
 - for return of money received on illegal contract, 483.
 - release of an attachment, 484.
 - liability and discontinuance in bastardy proceedings, 485.
 - compromise of doubtful claim, whether good or not, is sufficient, 486.
 - not if the claim is illegal, 486.
 - release of claims barred by statute of limitations, 487.
 - for claims already discharged, voluntarily or by law, 488.
 - invalid claims—coverture—fraud and mistake, 489.
 - purchase of goods by married woman, 489.
 - given in settlement of usurious notes, 489.
 - a promise to pay a forged note is without, 489.
 - surrender of a contract obtained by fraud, 489.
 - a supposed liability having no real existence is without, 489.
 - settlement of mutual accounts, 490.
 - for an illegal assessment, 490.
 - for injury for which payee had no right of action, 490.
 - forbearance or extension, 491.
 - indemnity of surety, 493.
 - part payment, as consideration for extension, 1410.
 - what is sufficient for guaranty, 857.
 - existing debt, as sufficing for bona fide holder, 461-465.
- illegal consideration:**
- void at common law, 494.
 - made illegal by statute, 494.
 - contracts with alien enemies, 495.
 - aiding the Confederacy, 496.
 - Confederate currency, 497.
 - for sale of public office, 498.
 - official fees, 498.
 - votes, 498.
 - to procure or hinder public contracts, 498.
 - to obtain gift of land for public building, 499 n.
 - services as lobbyist, 482, 499.
 - official action in neglect or discharge of duty, 500.
 - payment of fine, 500.
 - compounding crime, 501, 503.
 - establishing false defense, 501 n.
 - of tax, 500.
 - money embezzled or stolen, 502.
 - alleged crim. con., 502.
 - substituting a good bill for one that is forged, 503.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

CONSIDERATION—Continued.

agreement to suppress evidence, 504.
soliciting pardon, 504.
forbearance to prosecute a civil claim, 505.
champerty, 505 n.
in settlement of a private misdemeanor, 505.
agreements to facilitate a divorce, 505.
to discontinue divorce suit, 505.
contracts in restraint of marriage, 506.
so, for the procurement of marriage, illegal, 506.
contracts in restraint of trade, 507.
auction sales, 507.
in fraud of creditors, 508, 509.
in fraud of the bankruptcy law, 508, 509.
wagers at common law, 510.
in many of the United States, prohibited by statute, 511, 512.
racing wagers, 512.
wager policies of insurance, 513.
note for a lottery ticket void, 513.
for winnings at cards, 514.
so, stock gambling, though formerly not, 515.
"futures," 515.
"Bohemian oats," 515.
contracts in violation of morality and religion, 516.
all contracts in violation of a statute are void, 517.
even as to bona fide holder, 517.
excepted by statute, 517.
debt contracted in violation of the banking acts, 518.
who can set up defense, 518.
agreements in violation of the revenue and license laws, 519.
for smuggled goods, 519.
for medical services of an unlicensed physician, 519 n.
contracts in violation of Sunday laws, 520.
gambling loss paid to bona fide holder recoverable from payee, 520.
prohibiting clergymen from trading, 520.
attorney's bill not delivered according to the statute, 520.
illegal indenture of apprenticeship, 520.
an apprentice's fees, 520.
the assignment of an apprentice's time, 520.
fertilizers not branded and tagged as required by statute, 520.
drugs purchased from an uncertified apothecary, 520.
diseased sheep prohibited by statute, 520.
bills and notes in violation of the usury laws, 521.
see "Usury."
contracts in violation of liquor laws, 532, 533.
growing out of the sale of slaves, 534.
which lead directly to a violation of law, 535.
to indemnify against an unlawful act, 535.
knowledge of illegal intention, 535.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

CONSIDERATION—Continued.

- contemporaneous verbal agreement, 565.
- as to failure, 199.
- burden of proof, 566.
- want of consideration, 566.
- failure, 566.
- illegality, 566.
- usury, 566.
- burden as to holder for value, 567.
- not on holder, if accommodation proved, 567.
- on holder on proof of fraud, 567.
- illegality, 567.
- want of consideration, 567.
- failure, 567.
- diversion, 475.

defense:

- by whom made, 556.
- admissibility in general, 556.
- as to nonnegotiable paper, 556, 559.
- determined by what law, 38, 56.
- against original parties, 556.
- parties with notice, 556, 560.
- after maturity, 556, 561.
- not in due course, 556.
- effect on collateral, 556.
- on other notes of series, 556.
- want of consideration, 557.
- mental incapacity, 557.
- accommodation, 561, 907, 1879.
- failure of consideration, 558.
- by statute, 558.
- illegality of consideration, 559, 1584, 1587.
- statutory, 559, 517, 1589.
- usury, 1791.
- Sunday laws, 1790.
- what is holder for value, 560.
- pledgee, 560.
- with notice, 560.
- accommodation paper, 561.
- parties with notice, 561.
- purchaser after maturity, 561, 667.
- estoppel by conduct, 561.

as against bona fide holder:

- want of consideration, 557.
- illegal consideration, 496-501, 559.
- failure of consideration, 558, 1887.
- usury, 525, 526.
- between other parties, 556.
- nonnegotiable paper, 657.
- see "Defense."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

COPIES,

- of foreign bills not generally used in England and United States, 242.
- more common on the continent of Europe, 242.
- may be substituted for original, 242.
- a protest may be made on, 242.
- foreign statutes, 243.
- see "Foreign Bills."

CORPORATION BONDS,

- see "Bonds."

CORPORATIONS,

- capacity to take bill or note determined by *lex loci contractus*, 35.
- foreign corporation not doing business, 331.
- lex fori* requiring license, 35.
- execution by agent, 135 et seq.
- payee's legal existence admitted by maker, 163 n.
- foreign statutes, 146.
- parol evidence to charge or discharge, 147.
- bill drawn by one officer on another officer of the same corporation, 154.
- corporate authority to agent, 367.
- officers, 368 et seq.
 - see "Agents"; "President"; "Secretary"; "Treasurer."
- general corporate powers, 327.
 - have only such powers as are expressly conferred by charter, 327.
 - or which belong to them incidentally and by necessary implication, 327.
 - at common law could only contract under seal, 327.
 - otherwise now beyond dispute, 327.
 - may make a negotiable note under corporate seal, 327.
- power to execute bills and notes, 328.
 - formerly could not make a bill or note, 327.
 - cannot give a valid note to its acting trustee, 385.
 - trading corporations may issue bills like natural persons, 328.
 - St. Anne expressly confers this power, 328.
 - statutory prohibition, 329.
 - power is incident to business, 328.
 - so, of a municipal corporation, 328 n.
 - power of corporation for the erection of public works, 328.
 - of a railroad company in England, 328.
 - a mill company, 328.
 - a religious corporation, 328.
 - an insurance company, 328, 329 n.
 - mining companies, 328.
 - manufacturing companies, 328.
 - canal companies, 328.
 - building associations, 328.
 - a society for the erection of a public monument, 328 n.
 - a turnpike company, 328 n.
 - but cannot make a bill or note which is foreign to its business, 329.
 - when not presumed to have been executed in corporate business, 329.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

COUNTERFEIT, 1403.

see "Forgery."

COUPONS,

what, 12, 34, 159.

how transferable, 12.

have some of the incidents of a negotiable note, 12, 74 n.

when negotiable, 91, 336.

detached and payee not named, not negotiable, 150.

negotiable though detached, 91, 159, 348 n.

transferable by delivery, 159.

bona fides affected by overdue coupons, 1048.

barred by statute of limitations, 1597.

interest on, 1706.

presentment of, 1096.

Virginia bonds, 1405, 1406.

COURTS, UNITED STATES,

jurisdiction in suit by indorsee, 1637.

COVENANT NOT TO SUE,

what is, 949, 950.

is a release, 948.

discharges surety, 948.

COVERTURE,

see "Married Woman."

CROSSED CHECKS, 725, 1452.**"CURATOR,"**

indorsement as notice of its character, 888, 1010.

CURRENCY,

what is, 99.

payable in, 99, 449, 1398-1400.

negotiable, 99.

not explainable by parol evidence, 99, 103.

determined by lex loci solutionis, 81, 42, 56.

damages, 1733, 1736.

"CURRENT BANKABLE FUNDS,"

equivalent to United States currency, 497.

CURRENT BILLS,

payable in, 100.

CURRENT FUNDS,

what are, 99.

not explainable by parol evidence, 103.

CUSTOM,

justifies holding bank note for a reasonable time, 1107.

as to grace on bank post notes, 1056.

allowing four days' grace, 1055, 1088.

special custom must be clearly proved, 1055, 1081.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

DAMAGES—Continued.

prima facie the face of the bill, 1726.
 reduction by dividends, 1730.
 insolvency of maker, 1732.
 waiver of, 1725.
 presumed from delay in presentment, 1073, 1106.
 not as to acceptor, 1087.
 presumption from want of notice of dishonor, 1330.
 Confederate "Scaling Acts," 1735-1738.
 set-off of unliquidated damages, 1849, 1850.
 see "Interest."

DATE,

when necessary, 75.
 position on paper immaterial, 75.
 American statutes, 75.
 foreign statutes, 75, 81, 82.
 blank, 76, 186.
 antedating, 76, 79.
 after dissolution of partnership, 431.
 postdating, 79.
 postdated checks, 80.
 governed by delivery, 24, 77.
 terms not changed by delivery after apparent maturity, 77.
 presumption as to hour of delivery, 77.
 mistake in, 78, 1034.
 prima facie place of contract, 26, 33, 224.
 of residence, 81.
 of payment, 33, 124.
 conclusive in favor of a bona fide holder, 26, 44.
 so, local date, 81.
 of indorsement, 82, 224, 1624.
 foreign statutes, 713.
 acceptance, 83, 224.
 maturity is reckoned from date, 83, 110, 229, 598, 1634.
 or from delivery, 224.
 presumed to have been accepted on its, 83, 598.
 parol evidence admissible to explain, 77, 78, 83, 568.
 alteration of, 84, 1757.
 affects statute of limitations, 85.
 dated at the office of a corporation, as evidence of corporate act, 138, 140.
 signed and dated on Sunday, as evidence of delivery on that day, 225.
 parol evidence is admissible to show delivery on another day, 226.
 prima facie a foreign bill, if so dated, 235.
 presumptions as to, of blank indorsement, 686.
 guaranty presumed to have been made at date of note, 868.
 parol evidence to show when it was made, 868, 1046.
 as to bona fide holder, 1034.
 interest reckoned from, 1708.
 in certificate of protest, 1138.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

DATE—Continued.

in notice of dishonor, 1220, 1221.
mistake as to note in certificate of protest, 1162.

DEATH,

no delivery after, 221.
dissolution of partnership by, 434.
of joint maker, 1837.
as excuse for want of demand or notice, 1327, 1328.
extinguishment by, 1832.

“DEBT,”

an indorser's liability is a, 743.
payment is sufficient to constitute bona fide holder, 995.
subject to attachment, 812.
action of, 1674.

DEBTOR,

who is a, 692.

DECEASED PERSON,

cannot be payee, 150.
name subsequently used in business, 150.
indorser of such a note liable to a bona fide holder, 150.
bill indorsed by agent in ignorance of death of principal, 150.

DEFENSES,

in general, 1739.
against sealed note, 70.
nonnegotiable instrument, 177, 559, 657, 1884.
nonnegotiable in other states, 811.
statutes subjecting to defense, 1885.
collateral security, 1884.
renewal, 1583-1585.
partner, binds firm, 402.
other party sued in same action by statute, 1661.
against purchaser after maturity, 674-679, 788, 1034, 1879, 1880.
 see “Maturity.”
against purchaser without indorsement, 788, 792, 1877.
consideration, 1878.
effect of subsequent indorsement, 793.
with notice, 1876.
notice, actual or constructive, 343, 386.
as to exceeding partnership authority, 413.
burden of proof, 413.
against original bearer, 159.
against payee, 1875.
against pledgee, 796 et seq., 1638, 1878.
agent sues subject to defenses against principal, 1658.
agreement changing contract, 1815.
attachment against payee, 811 et seq.
 see “Attachment.”

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

DEFENSES—Continued.

- bankruptcy, discharge, 1833.
- bankruptcy, composition, 1834.
- capacity and authority, 1887.
- conditions, 1888.
- consideration, want of, 445, 478, 538, 1887.
- against purchaser after maturity, 676.
- accommodation, 474, 476, 557, 561, 634.
- against purchaser after maturity, 677, 1879.
 - see "Accommodation Paper."
- consideration, inadequacy, 448, 451, 538.
- illegal, 518, 1787, 1788.
- admissible against indorsee after maturity, 510, 676.
- failure of, 538-556.
- partial, 539, 544-546.
- statutes, 540.
- estoppel as to want or failure of, 538, 561.
- walver, 538.
- between other parties, 556.
- corporation by-laws not complied with, 1886.
- death as a discharge, 1832.
- delivery conditional, 1888.
- diversion, without payee's indorsement, 788.
- estoppel by acceptance, 631.
- against infant stakeholder retaining fund, 512.
- reissue after payment, 634.
- execution, discharge by, 1832.
- extension, 1817-1822.
- foreign statute of limitations, 1594.
- forgery, when waived, 1782.
- fraud, 447, 452, 630, 1026, 1799, 1800, 1850.
- fraud, admissible against purchaser after maturity, 676.
- gaming, 514.
- guarantor cannot set up defenses available to his principal, 496, 857, 862.
- notice of default to, 885.
- discharge by negligence, 890.
- of other guarantor, 887.
- illegality affected by renewal, 536.
- indorser cannot set up that note was made on Sunday, 226.
- judgment recovered against other party, 1661, 1830.
- merger by, 1828.
- liquor laws of other state, 533, 535.
- maker cannot set up incapacity of payee, 271, 331.
- or fraud on payee, 662.
- marriage, as extinguishing liability, 1832.
- municipal warrants issued without authority, 389.
- payment, 1450, 1454, 1462-1465.
- against purchaser after maturity, 678.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

DELIVERY—Continued.

- causa mortis, 454 n., 806 et seq.
- before maturity, 988.
- instrument takes effect from, 224.
- prima facie at date, 224.
- maturity reckoned from, if no expressed date, 224.
- governs date, 24, 38, 77.
- necessary to fill blanks before, 181.
- signing not a, 216.
- need not be specially pleaded, 217.
- presumed from possession, 217.
- in favor of bona fide holder, 217, 220.
- authority to fill blanks implied from delivery, 224.
- on Sunday, 225, 1790.
- American statutes, 520.
- question for the jury, 225.
- dated on Sunday, delivery shown on other day, 226.
- in escrow, 221, 227.
- conditional, 228, 229.
- defense for want of, 230.
- estoppel by negligence, 230.
- defense may be shown by parol, 231.
- for fraud in obtaining, 690, 1893.
- transfer by delivery:
 - if payable to bearer, 696.
 - to "A., or bearer," 698.
 - to fictitious payee, 697.
 - indorsed in blank, 696, 705.
 - sealed note to bearer, 699.
 - interest coupons, 699.
 - bills of lading, 699.
 - warrants genuineness, 753.
 - not solvency of prior parties, 743.
 - transfers title, 787.
 - and right of action, 790.
 - subject to equities, 788.

DEMAND,

see "On Demand"; "Presentment for Payment."

DILIGENCE,

- determined by what law, 38.
- against maker, 761-763, 1662.
- to hold guarantor, 861, 887, 893.
- may be waived, 888.
- principal, 926 et seq.
- deceased principal's estate, 939.
- irregular indorser, 846.
- to enforce collateral, 804, 1678.
 - see "Law and Fact"; "Notice of Dishonor"; "Presentment."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

DOMICILE,

- law of domicile, 28.
- change of, after execution of contract, 29 n.
- effect on question of usury, 46.
- what law determines capacity, 28.
- acceptor's domicile prima facie place of payment, 28.

DONATIO CAUSA MORTIS,

- not favored by the courts, 805.
- are to be strictly construed, 805.
- revocable during donor's life, 805, 806.
- subject to donor's debts, 805.
- in England liable to legacy duty, 805.
- may be made by wife to her husband, 805.
- must be made in expectation of impending death, 806.
- must take effect on the donor's death, 806.
- delivery is necessary, 454 n., 806, 807, 809 n.
- to payee himself or to some one for him, 807.
- intention to deliver must be clear, 807.
- constructive delivery, 806.
- what may be given causa mortis, 809, 810.
- negotiable instruments, 454, 809.
- bank notes and bills, 809.
- note payable to order without being indorsed, 809, 807 n.
- to bearer, 809.
- not donor's own note or check, 810.

DRAWEE,

- defined, 4.
- action against, without acceptance, 1664.
- not liable until acceptance, 635, 644.
- discount by, 1424.
- payment presumed from possession by, 1476.

DRAWEE'S NAME,

- should appear in the instrument, 171.
- shown by address, 171.
- supplied by acceptance, 171, 185.
- required by foreign statutes, 171.
- drawer and drawee one person, 172.
- fictitious, 172.
- may be the payee, 172.
- drawer, drawee, and payee one person, 172.

DRAWER,

- defined, 4.
- liability regulated by lex loci contractus, 29, 38.
- when governed by lex loci solutionis, 38, 39.
- liable to pay at place of drawing on nonacceptance, 122.
- blank filled after acceptor's death, 185 n.
- drawer-agent of drawee, 382.
- drawer or maker-agent of payee, 383.
- see "Action"; "Notice of Dishonor"; "Presentment."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

DRAWER'S NAME,

manner of execution, 129-149.

see "Agent"; "Executor," etc.; "Partner."

DRUNKENNESS, 262-264.

no defense at suit of a bona fide holder, 262.

DUEBILL,

defined, 11.

is negotiable by statute in some states, 11.

equivalent to a promissory note, 88, 150.

statute of limitations runs from date, 1597.

DURESS, 1805.

admissible against a bona fide holder, 303, 1805.

on maker cannot be set up by indorser, 1808.

E**EQUITY,**

only where legal remedies fail, 1685.

not because payee died before indorsing, 1642 n., 1685.

not refused because of technical legal defense, 1680 n.

no recovery on original consideration after bill altered, 1763.

accommodation indorser protected, 1894.

agreement for acceptance, 618.

cancellation of bill, 1686.

of infant's note for fraud, 270.

collateral, sale ordered, 803.

consideration, failure of, 538, 548.

contribution, where changed by insolvency, 1685.

creditors' bill in aid of attachment, 1685.

discovery, 1690, 1696.

executor, held as such, after giving his own note, 438.

compelled to indorse, 442.

fraud, 1811, 1830.

of prior party, 800.

heirs' and devisees' statutory liability, 1685.

illegality, 503.

indorsement omitted by mistake, 793.

construed to be in trust, 1685.

infant liable in equity, 272.

injunction against suit, 1688, 1689.

by pledgor, 796.

vexatious, 1661.

legal defense estopped in equity, 1687.

transfer, 1687.

by holder with notice, 423.

by surety of insolvent principal, 974.

diversion of accommodation paper, 473.

execution of note by partner, 417.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

EQUITY—Continued.

illegal issue of municipal bonds, 1687.
not granted where legal defense, 1686.
interpleader, 818, 1685.
lost bills, 1696.
mistake, 550, 1686.
ne exeat, 1685.
pledgee to collect and apply, 1685.
reform of bill, 1686, 1765.
satisfaction by payee after transfer canceled, 1895.
set-off against plaintiff's firm, 1855.
not yet due, 1857.
statute of limitations applies, 1591.
surety protected, 1667, 1802.
against fraud, 918.
laches, 931, 934.
proceedings against principal, 960.
contribution, 972, 977.
subrogation, 982, 985.
set-off, 923.
surrender of note after payment, 678.
of municipal bond, 1687.

ERASURE,

blank implies no authority to make, 182.
filling in a bill marked "first," "second," etc., is an alteration, 182 n.
so, maker's name, 1748.
surety's name, 1745.
indorser's name in blank indorsement, 185.
of an indorsement, 717, 1644.
of "renewal" on bill, 997.
as notice of defects, 1011.

ESCROW,

delivery in, 227.
cannot be to the payee himself, 227.
or his agent, 227.
or to co-maker, 227.
defense at suit of a bona fide holder, 227, 230, 1888.
payee with notice, 227.
exchange of notes, both delivered in escrow, 230.
parol evidence, 231.
declarations of depositary admissible against purchaser after maturity,
231.
relief in equity, 229.
in trover, 229.

"ESTATE OF A."

a note payable to, 152.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ESTOPPEL—Continued.

- in suffering delivery, 230.
- by signature, 1779, 1780, 1867.
 - see "Acceptance"; "Indorsement."
- by apparent relation of parties, 1866.
- by their personal or official relation, 1866.
- by joint interest or fraud, 1867.
- by representations and admissions, 1781, 1868.
- subsequently made, 1869.
- in other instrument, 1868.
- made by others, 1869.
- obtained by fraud, 1868.
- binding on subsequent receiver, 1868 n.
- recitals in municipal bonds, 345.
- new promise, 1871.
- giving new bill or note, 1870.

EVIDENCE,

- governed by what local law, 55.
- signature, 67, 69.
- attestation, 68, 69.
- indorsement, 773-775.
- seal, 73.
- agent's authority, 393.
- against acceptor of bill payable to, and drawn and indorsed in fictitious name, it is sufficient to prove signature and indorsement made by same person, 164.
- acceptor's knowledge of fictitious party shown by other similar acceptances, 164.
- by attorney as witness as to affixing stamp before delivery, 211 n.
- stamp admissible in evidence, 214.
- acts of congress relate only to the United States courts, 214.
- unstamped instrument admissible in, for collateral purposes, 215.
- inadequate consideration, as evidence of fraud, 448.
- want of consideration, as affecting bona fides, 1028.
- implied from possession, 1418.
- bona fides denied and proved, 1000.
- suspicious circumstances, 423.
 - see "Bona Fide Holder."
- lunacy, 259.
- inquisition, when conclusive, 260.
- admissions by principal, 393.
- partner after dissolution, 428.
- dissolution of firm, evidence of, 437.
- similar notes recognized by firm as proof of authority, 405.
- fraud under general issue, 423.
- minutes of corporation to show agent's authority, 367.
- recognition of cashier's acts by directors, 367.
- production of bill by holder, 565.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

EVIDENCE—Continued.

- inspection of alteration by the court, 1893.
- illegality of consideration, 496.
- consideration for guaranty, 878.
- payment, 1477-1482.
- alteration, 1786.
- certificate of notary, 1148-1153, 1160-1185, 1310-1313.
- misdescribing note, 1162.
- dishonor proved by notarial certificate, 1179, 1180.
- notarial acts out of his own state, 1173.
- seal, 1160, 1170.
- signature, 1170.
- notice of dishonor, 1309 et seq.
- certainty, 1312.
- sufficiency, 1314.
- admissions, 1315.
- subsequent promise, 1316, 1317.
- proof of contents, 1319.
- excuse, 1322.
- diligence, 1250, 1275, 1285.
- postmark, 1250, 1319.
- certificate of notary, 1148, 1168 et seq., 1181-1185.
- presentment, how proved, 1077.
- as averred, 1071, 1127.
- by notary's clerk, 1081.
- when made, 1095.
- excuse, 1178.
- proof by notarial record, 1137.
- certificate, 1148, 1174-1180.
- American statutes, 1149-1153.
- protest, proved by notarial record, 1172, 1176.
- see "Estoppel"; "Law and Fact"; "Onus Probandi"; "Parol Evidence"; "Presumptions."

"EXCEPTED,"

written by mistake for "accepted," 600.

EXCHANGE AND RE-EXCHANGE,

- rate of, determined by what law, 42, 56, 1714, 1715.
- additional stipulations for, 200.
- against drawer, 1714.
- by agent against principal, 1714.
- against acceptor, 1714.
- fixed by agreement, 1714.
- addition is material alteration, 1754.
- see "Damages."

EXECUTION,

- purchaser of note under an, 989.
- could not reach a note or bill at common law, 825.
- otherwise by present St. 1 & 2 Vict., 825.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

EXECUTION—Continued.

in United States, regulated by statute, 826-828.
 return of an, "satisfied in full," is presumptive evidence of payment, 941.
 release of, 1842.
 against other party, 1842.
 does not affect set-off, 1865.
 discharge by, 1831.

EXECUTORS,

capacity to transfer determined by *lex loci contractus*, 35, 49.
 execution of instrument by, 134.
 cannot bind the estate by bill or note, 438.
 note to self presumed fraudulent, 444.
 personal liability of, 439.
 on a note or bill given by them as such, 439, 1510.
 upon a written promise to pay a debt, 439.
 consideration necessary, 467.
 on renewal of note made by testator, 439.
 on promise founded upon other sufficient consideration, 439.
 note is presumptive evidence of assets of estate, 439.
 parol evidence to discharge him from liability, 439.
 as a member of a firm, where he represents a deceased partner, 439.
 as payees, 158, 440.
 such words merely *descriptio personæ*, 440.
 may sue in his own name or in representative capacity, 440.
 administrator *de bonis non* can sue, 440.
 will survive on executor's death to his representative, 440.
 transfer by, 441.
 may complete transfer by testator, 442.
 by one of several joint executors, 442.
 public sale required, in California, 442 n.
 action by, 1642, 1650.
 extension by, 956.
 presentment by, 1080.
 notice of dishonor to, 1220, 1244, 1245.
 payment to, 1448.
 by bill, 1448.
 by, to bar statute of limitations, 1628.
 acknowledgment by, to bar statute, 1617.
 set-off against, 1861.
 release by appointment as executor, 1832.
 see "Action"; "Administrator"; "Payee's Name."

EXEMPTIONS FROM LEVY AND SALE,

are questions governed by the *lex fori*, 57.

EXONERATION OF SURETY.

see "Surety."

EXPERT TESTIMONY,

broker not competent to prove what facts amount to notice of defects.
 1002.

[Reference is to sections. Vol. 1, §§ 1-587; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

EXTINGUISHMENT,

- equivalent to payment, 464.
- transferring bill, before maturity, to acceptor, 667.
- note paid at maturity is, 682.
- by marriage, 1832.
- by death, 1832.
- by appointment as executor, 1832.
- by bankruptcy, 1833.

F**FEDERAL COURTS,**

- bound by state decisions, 20.
- jurisdiction not obtained by waiver, 92.

FEME COOVERT,

- see "Married Women."

FICTITIOUS NAME,

- a bill with drawee's name is equivalent to a promissory note, 172.
- maker's or drawer's name, 148.
- maker liable, but not on instrument, 148.
- firm's name, 130.

FICTITIOUS PAYEE, 161, 163, 164, 169.

- equivalent to being payable to bearer, 161, 697.
- "or bearer," "to order," equivalent to bearer, 161.
- fraudulent indorsement of a, is a forgery, 162.
- maker cannot question, 162 n.
- holder may show himself intended, 162.
- parol evidence admissible to show it, 162.
- real payee forged by maker, 161.
- onus probandi on holder, 162.
- American and foreign statutes, 169, 170.
- see "Payee's Name."
- liability of acceptor to bona fide holder, 161, 164, 666.
- to holder with notice, 163.
- without proof of consideration, 164.
- note delivered to one made payable to another, 790.
- as affecting a bona fide holder, 1022.

FIGURES,

- amount expressed in, 105.
- subject to expressed amount in body of paper, 105.
- foreign statutes, 105.

FORBEARANCE,

- see "Extension."

"FOR COLLECTION,"

- see "Collection."

FOREIGN ADMINISTRATOR,

- may indorse, 1633.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

FOREIGN STATUTES—Continued.

blank indorsements being prohibited, 189.
stamp, 209.
foreign and inland bills of exchange, 232.
parts and copies of foreign bills, 243.
capacity, civil restrictions, 245.
infants, 265.
ratification by infant must be in writing, 276.
liability and capacity of married women, 281, 303 n.
requirements of, as to partnership contracts, 394.
English statute conferring banking powers, 332.
making bills or notes indorsed or made in the name of a company, under its authority, binding upon it, 362, 393 n.
St. 6 Anne, c. 22, 328.
factors or agent pledging principal's goods, 366.
English bankrupt act, 488 n.
contracts to ransom British ships void, 495 n.
English statutes against gaming, 511, 512.
stock jobbing act, 515.
statute making note valid in hands of a bona fide holder, 517.
usury acts, 521.
pleading want of consideration, 564.
requiring presentment for acceptance, 582.
laches in presentment, 583, 587.
presentment by and to whom, 584.
time for presentment, 585, 586.
where presented, 587.
what law determines day for presenting bill, 586.
different parts forwarded in different ships, 586.
presented and protested, 243.
when received too late, express waiver in writing necessary, 587.
laches in presentment discharges the drawer and indorser, 587.
damages, 587.
acceptance defined in, 588.
obligation to accept, 590.
acceptance by agent, 592.
partners, 593.
when made, 595.
may be after acceptance refused, 596.
by signature only, 603, 607.
in writing, 604, 607.
date of acceptance, 608.
must specify where bill shall be paid, 608.
"there only and not elsewhere," 122, 126, 626.
agreements to accept, 619.
conditional acceptances, 627.
acceptance for part payment, 627.
revocation of an acceptance, 638.
acceptance, what it admits, 641.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

FOREIGN STATUTES—Continued.

forgery, 1741.
 alteration after delivery only by consent of all parties, 1766.
 under the British stamp act, 1773.
 set-off against bankrupt's estate, 1856.
 see Appendix II.

FORGERY,

defined, 1739.
 indorsing note payable to the "stewardess for the time being of the P. D. Society," 152.
 indorsement of maker's name on note payable to maker's order, 154.
 by maker of payee's indorsement, 161.
 fraudulent indorsement of fictitious payee's name, 162.
 party negotiating with knowledge of, estopped from denying, 163.
 indorsement by party of same name is a, 166.
 estoppel by acceptance, 164, 629.
 bill payable "to ———, or order," cannot be the subject of, in England, 168.
 note written over genuine signature, 181.
 may be a, though bill is unstamped, 213.
 agent signing principal's name without authority is, 386.
 principal cannot ratify, 374.
 fraud by agent cannot make an indorsement of principal's name a, 390.
 describing a bill in an indictment for, 588, 836.
 indorsement, foreign statutes, 712.
 recovery on, 790, 1468, 1469.
 payment on, 636, 1468, 1469.
 of principal's name, effect on surety, 913.
 alteration by crossing of check is not, 1453.
 recovery of payment made on forged signatures, 1486, 1487.
 statute of limitations against recovery, 1608.
 payment by a forged bill, 1530.
 statute of limitations does not run against, 1591.
 separating condition from note is, 1752.
 note printed over a blank signature is a, 1768.
 blank fraudulently filled up is a, 1768.
 ratification of forged instrument, 629, 1775.
 not liable on a forged instrument, 1739.
 even to bona fide holder, 1777.
 unless estopped by his conduct, 1739, 1782.
 prompt notice must be given, 1469, 1488, 1740.
 foreign statutes, 1741.
 alteration of payee's name is, 1740.
 writing name of fictitious payee as indorser, when blank is left, 1753.
 waiver of defense, 1782.
 parol evidence admissible, 1896.

FRAUD,

by partner on partnership, 418 et seq.
 parol evidence admissible to show fraud in making amount too large, 106

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

FRAUD—Continued.

effect of renewal, 1812 n.
 consideration for waiver, 1812 n.
 fraud used as a set-off, 1850.
 how pleaded, 425, 1027, 1813.
 burden of proof is on party averring it, 1026, 1814.
 averring waiver, 476.
 is a question for the jury, 1814.
 parol evidence admissible to prove, 1814, 1806.
 as a defense, 1868, 1872.
 as affecting a bona fide holder, 1891.
 between what parties, 1892.
 in delivery, 1893.
 fraudulent diversion of accommodation paper, 1894, 1896.

"FUTURES,"

illegal consideration, 515.

G**GARNISHMENT, 816-818.**

see "Attachment."

"GIVEN FOR A PATENT RIGHT,"

when necessary to be expressed, 86, 559.

GOLD,

requirements, satisfied under United States legal tender act, 98.

"GOOD,"

stipulation that note is, means that it is collectible, 867.
 parol evidence admissible to show that, means valid, 868.

"GOOD AND COLLECTIBLE,"

guarantying of note to be, 884.

"GOOD FOR,"

equivalent to a promise to pay, 87.

"GOOD, IF IT IS NOT,"

one promising to make a note, 884.

GOODS,

notes and orders payable in, 101.

GOVERNMENT,

may issue commercial paper, 348, 350.
 by its authorized officers may become a party to negotiable paper, 350.
 with all the rights and liabilities of an individual party, 350.
 except the liability to be sued, 350.
 paying a check on a forged indorsement, 350 n.
 bonds negotiable by statute, 74.
 by custom of market, 74.
 statutory procedure to determine validity, 350 n.
 a state is liable as an indorser of negotiable railroad bonds, 350 n.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

GRACE—Continued.

- checks payable at a future day, 1056.
- promissory notes, 1056.
- post notes in Massachusetts, 1056-1058.
- interest coupons in form of note, 1056.
- single bills in Tennessee, 1056.
- nonnegotiable notes in some states, 177, 1056, 1057.
- particularly so if made negotiable by indorsement, 1057.
- notes without the words "or order," "or bearer," 1057.
- notes with the words "without defalcation," 1057.
- note payable one day after date, 1057.
- or payable on or before a given day, 1057.
- or payable on a day certain named in it, 1057.
- payable in twelve months, 1057.
- payable in installments, 1058.
- post note with interest until due, 1057.
- notwithstanding bank custom, 1058.
- on sight bills, 1059.
- demand notes, 1060.
- by American statutes, 1063-1065.
- by foreign statutes, 1066.

what instruments are not entitled to:

- promissory notes prior to St. Anne, 1056.
- so now in some of the United States, 1056.
- duebills, 1056.
- nonnegotiable notes in some states, 177, 1056, 1057.
- sealed notes, 70, 1056, 1062.
- note payable on the "first day of May next fixed," 1057.
- bills payable at a fixed time, 1058.
- draft payable on a day certain, 1058.
- interest due from what day, 1058.
- sight bills, 1059.
- sight drafts, 1059.
- bills payable certain time after date, 1059.
- draft specifying no time of payment, 1059.
- demand notes, 117, 1060.
- notes not expressing time of payment, 1060.
- checks or certificates of deposit, 16, 1060.
- indorsed checks, 1060.
- postdated checks, 80, 1060.
- bank bills, 16.
- corporation bonds, 1060.
- notes waiving grace, 1057.
- note made after statute passed allowing, 1062.

GUARANTY,

- defined, 849.
- distinguished from surety, 849.
- indorser, 849.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

GUARANTY—Continued.

and subject to equities, 861 n., 862 n.
not rendered negotiable by being indorsed on a negotiable note, 176, 861.
actions by and against guarantor, 862.
may be either on the instrument or on a separate paper, 863.
express or implied, 863.
of part of amount, 734.
by one signing as maker or surety, 863.
acceptance of a bill by one who is not drawee, 863.
a second acceptance by one not named as drawee, 594.
collateral, should be expressed, 749.
is limited in its effect to the immediate parties, 749.
filling blanks, 868.
foreign statutes, 868.
indorsing name on back of bill or note, 704, 708, 864.
by stranger, 168, 838.
transfer and guaranty may both be in one instrument, 849, 865.
will operate as a transfer, 730, 865.
indorsement after maturity, 671, 866.
guaranty of payment is an original promise, 866.
payee's indorsement in blank on nonnegotiable note, 658-660, 866.
indorsement of such note by stranger, 866.
payee's indorsement in blank on a sealed note, 866.
see "Indorsement."
by separate instrument, 867.
parol evidence admissible to explain the contract, 868.
and the consideration, 878.
to show an indorser to be a guarantor, 781.
and whether an original or collateral contract, 871, 873.
statute of frauds, when not applicable, 870-872.
whether original or collateral, determined by circumstances, 871.
question for the jury, 871, 873.
parol evidence is admissible in determining it, 871.
contemporaneous, is an original promise, 871.
not necessary that person guaranteed should be named, 872.
to be in writing, 873.
or that the consideration should be expressed, 872, 873.
statute of frauds applicable to collateral contracts, 871, 874.
note may be void and collateral pledge valid, 873 n.
consideration must be expressed, 446, 875.
when sufficiently expressed, 876, 877.
contemporaneous or subsequent, 445, 446.
proof of consideration, 878.
"value received" raises a presumption of consideration, 178, 876, 878.
presumed from averments in pleadings, 878.
is a question for the jury, 878.
may be proved by parol, 878.
when the statute applies the guaranty must be in writing, 879.
presentment for payment not, in general, necessary, 880, 1072.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

GUARANTY—Continued.

unless damaged by want of it, 880.
demand and notice unnecessary, 880, 886, 1206-1210.
exact punctuality not required, 1255.
when necessary, 881.
what is a reasonable time to make demand, 882.
or notice of protest, 883.
notice of maker's default, 884.
is not, in general, necessary, 884-886.
reasonable notice of maker's default is a question for the jury, 886.
when not necessary, 883.
when insolvency excuses demand and notice, 1330.
when diligence in prosecuting maker is necessary, 887, 888.
distinction in this respect between a guaranty of payment and of collection, 887.
when diligence against the maker is not necessary, 889.
damaged by negligence, 890.
what is due diligence, 891.
"by due process of law," 892.
what is not due diligence, 893.
discharge by fraud will discharge guarantor, 894.
extension granted by holder to principal debtor, 894.
taking part payment and receiving new bill, 894, 895.
collateral, 895.
the transfer of collateral, 895.
surrender of collateral, 895.
mere change of contract, 895.
opening new account, 895.
composition made with bankrupt principal with guarantor's consent, 895.
release and waiver, 895.

"GUARANTY TO PAY,"

equivalent to a promise to pay, 87.

GUARDIAN,

execution by, 134.
giving a note, is personally liable, 443.
consideration necessary, 469.
if made to one as, he may sue upon it in his own name, 444.
even after the expiration of his office, 444.
and after his death his executor may sue on it, 444.
security in lieu of it, 444.
cannot credit upon a note an individual debt of his own to the maker, 444.
although then solvent, 444.
debts of his ward are proper set-off against note to guardian, 444.
presentment to, 1086.
notice of dishonor to, 1086.
payment to, 1086.

GUARDIAN OF A.,

sufficient designation of the payee, 152.

H**HEBREW LETTERS,**

prohibited, in Hungary, in a note or bill, 86.

"HEIRS OF A.,"

sufficient designation of the payee, 152.

"HOLDEN,"

implies a promise to pay, 87, 864.

waiver of demand and notice, 1358.

"HOLDEN WITHOUT DEMAND OR NOTICE,"

indorsement on a note, 889.

HOLDER,

defined, 14.

designated by "bearer," 14, 174.

"order," 14.

action by, 1650.

prima facie party in interest, 1651.

synonymous with bearer, 653.

see "Action."

HOLDER FOR VALUE,

see "Bona Fide Holder."

HOLIDAYS,

legal, determined by law of place of payment, 1031.

what are, 1031.

presentment for acceptance on, 580, 585.

paper maturing on, 1032, 1033.

American statutes, 1032, Appendix I.

foreign holidays and fairs, 1052.

paper maturing on, presentment, how pleaded, 1033.

when should be made, 1033.

tender of payment, when made, 1033.

how affected by grace, 1033, 1061.

effect of statute making new holiday, 1090.

protest should not be made on legal, 1140.

unless expressly authorized by statute, 1140.

not necessary to give notice of dishonor on, 1200.

see "Maturity"; "Notice of Dishonor"; "Presentment."

HONOR,

see "Acceptance Supra Protest"; "Payment Supra Protest."

HUSBAND AND WIFE,

see "Married Women."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

"I,"

when equivalent to "we" promise, 87.

IDIOT,

see "Lunatics."

"IF IN FUNDS,"

acceptance, 623.

ILLEGALITY,

see "Consideration"; "Defense."

IMBECILE,

see "Lunatics."

IMPLICATION,

of payee's name by, 151.

extending time for maturity of a note by, 119.

partnership may be created by, 395.

authority to bind a firm, after dissolution may be by, 427.

acceptance by, 599, 620.

agreement to transfer is agreement for indorsement, 688.

release by, 1837.

waiver of demand and notice by, 1357, 1383, 1384, 1389-1391.

application of payment by, 1490.

extension by, 1570.

authority to sue in indorser's name, 1634.

"IN BEHALF OF,"

execution, indicates act of principal, 139.

"IN CASE OF NEED,"

what, 4.

INDEMNITY,

on lost bill, 1693-1695.

INDIANS,

statutory restrictions, 247.

INDORSEMENT,

general principles:

defined, 13, 701, 786.

governed by what local law, as to form, 36, 48.

as to liability, 38, 39.

payable where, 26.

made at time of date, 78 n., 82.

alteration of date, 82.

governed by law then in force, 739.

presumption as to foreign law, 27.

bill and indorsement different contracts, 48, 739.

delivery necessary, 216, 689, 805.

irrevocable after delivery, 717.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

INDORSEMENT—Continued.

- seal does not affect negotiability, 70.
- stamp required for nonnegotiable note, 653.
- consideration necessary, 691.
- contemporaneous or subsequent, 445, 446.
- its adequacy, 452, 693.
- accommodation, 472, 692, 747.
- revoked by indorser's death, 474.
- consideration presumed, 691.
- striking out of indorsements, 715-717.
- alteration, 718, 1753, 1779.
- by erasing "without recourse," 722.
- striking out plaintiff's own indorsement, 1644, 1695.

when necessary:

- to transfer bill to "order of A.," 151, 153.
- not to suit by A., 151.
- to order of maker, 153.
- not, if payable to bearer, 159.
- to fictitious payee, 162.
- to "A., or bearer," 175, 698.
- to "self and A.," 663.
- to agent as payee, and suit by principal, 156, 447.
- to order of drawer, as against acceptor, 154.
- not to enable agent to make presentment, 1079.
- coupons, 159.
- when necessary to holder in usual course of business, 789, 989.
- omission by mistake or fraud, 787, 792.
- delivery without indorsement, 787, 788.
- of certificate of stock, 794 n.
- action without indorsement, 1653.
- under indorsement, 1635.

by whom:

- by payee of note payable to bearer, 653.
- by joint payees, 155, 663, 740.
- by one of several joint payees, 2, 602.
- by joint owners, 663.
- by partners, 155.
- after dissolution, 429, 433.
- by agent, 664.
- by officer of corporation, 988.
- and prima facie by corporation, 363.
- official indorsement as notice, 1010.
- agent's indorsement as notice, 1012.
- power to indorse includes waiver, 1361.
- ratification by principal, 664.
- revocation by principal's death, 665.
- by married woman, 288.
- by survivor of husband and wife, 155.
- by infant, 271.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

INDORSEMENT—Continued.

- by executor, 665.
- delivery by executor after indorsement by testator, 665.
- by heirs and next of kin, 665.
- by joint maker, 739 n.
- forged indorsement, 1468, 1469.
- not a transfer, 662.
- to whom:
 - reindorsement, 719.
 - to maker, 667.
 - to first indorser, 667.
 - to bearer, enlarging negotiability, 176.
 - crossed check, 1453.
- time of:
 - before bill is drawn, 668.
 - before or after acceptance, 669.
 - after acceptance refused, 669.
 - after maturity, 670, 673, 739.
 - does not relate back to date of note, 687.
 - supplied after omission, relates back to transfer, 792.
 - after maturity of detached coupon, before maturity of bond, 670.
- form, 702, 704.
 - position, 13, 66, 701, 713.
 - by mistake, on face of note, 154.
 - in firm name with fictitious drawer, 409.
 - general or special, 13, 700.
 - conditional or absolute, 13, 723.
 - express guaranty indorsed is an indorsement, 865.
 - foreign statutes, 712-714.
- restrictive:
 - to A., "at his own risk," 176.
 - restrictive, 724, 1009.
 - effect on negotiability, 724.
 - revocable at pleasure, 724.
 - cannot be struck out, 715.
 - "to A. only," "for use" of B., 725.
 - crossing check, 725, 1453.
 - "for collection," 726, 735.
 - "for deposit," 726.
 - "without recourse," 720, 755.
 - similar expressions, 721.
 - intended for which indorser, 720, 779.
- effect, 13, 729.
 - equivalent to foreign bill, 234.
 - may be declared on as such, 739.
 - not an acceptance, 600, 618.
 - following an express assignment, 742.
 - is more than mere assignment or transfer, 745, 1662.
 - transfers debt, 729.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

INDORSEMENT—Continued.

- transfers the bill, 727.
- transfer of part, 734.
- with attorney's fees, 729.
- and other agreements and rights, 729, 732.
- carries collateral securities, 731.
- subject to defenses, 731, 1844.
- carries vendor's lien, 732.
- and power of sale in collateral mortgage, 730 n.
- collateral reserved from transfer, 733.
- carries guaranty, 860.
- though in separate instrument, 861.
- carries warrant to enter judgment, 730 n.
- and right of action to set aside fraudulent conveyance, 730 n.
- indorsement after maturity is a new bill or demand note, 671, 1098.
- transfers indorser's title, 673.
- is not a waiver of demand and notice, 672.
- does not carry right of action on the original consideration, 673.
- for accommodation, no power to alter, 361.
- for collection, a power to collect, 377.
- effect on bona fides of subsequent holders, 1008.
- effect of restrictive indorsement, 727.
- "without recourse," effect on bona fides, 722, 1008.
- on negotiability, 722.
- foreign statutes, 728.
- of nonnegotiable note as guaranty is itself nonnegotiable, 861.
- operates as a transfer, 729 n.
- indorsee may sue, 738, 1633.
- by American statutes, 738.
- negotiability not affected by conditional indorsement, 723.
- or by special indorsement, 655.
- or indorsement without recourse, 722.
- bona fides not affected by special indorsement, 1008.

Liability:

- when a guaranty, 745.
- indorsement of note to bearer, in Illinois, 864.
- effect of including guaranty, 745.
- warranty, prior signatures genuine, 752, 1467, 1469.
- and by due authority, 392.
- note not altered, 1779.
- and valid, 756.
- capacity of prior parties, 756.
- existence of debt, 756.
- solvency of maker, 748.
- title of indorser, 755.
- warranty by indorsement "without recourse," 720, 752, 755, 758.
- by indorsement for collection, 752 n.
- by delivery without indorsement, 748, 749.
- by indorsement after maturity, 671.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

INDORSEMENT—Continued.

may be stricken out, 717.
made restrictive, 724.
by stranger, how filled, 840.
is a guaranty, 864.
guaranty passes with transfer of note, 860.
payee's on a sealed note is an assignment and not a guaranty, 866.
writing is sufficient under the statute of frauds with express authority
to write guaranty, 879.
foreign statutes, 711.

pleading:

averments as to, 773.
as to intermediate indorsements struck out, 718.
see "Pleading."

evidence:

proof necessary, as against drawer, 662.
and in general, 774.
not admitted by acceptance, 632.
relation inter se not concluded by judgment against several indorsers.
740 n.
indorsement of payment to bar statute of limitations, 1625.
parol evidence to explain, 778 et seq., 784.
not to vary, 1903.
to show for collection and not for transfer, 690.
or to take up other bill, 690.
see "Evidence"; "Parol Evidence"; "Presumption."

irregular indorsement by stranger:

signing before payee, 66, 829 et seq.
as maker, 829, 831-833.
intention may be shown by parol, 829, 833, 841, 842.
as indorser, 833.
guarantor, 833, 838.
surety, 839.
and co-sureties, 839 n.
second indorser, 834, 837.
liability to payee, 838, 844, 845.
to accommodation acceptor, 844.
presumption as to date, 82.
as to liability, 833 n.
after transfer, 830.
after maturity, 830.
nonnegotiable notes, 830.
statute of frauds not applicable, 843.
after delivery requires new consideration, 446.
diligence against maker necessary, 846.
effect of release of prior parties, 846.
notice of dishonor, 847, 831.
sued jointly with maker, 848.
see "Indorser."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

INDORSER—Continued.

liability of, on nonnegotiable paper, 658, 659.
 entitled to notice of dishonor, 1204.
 when note made "with recourse," 659.
 liability of, on paper transferred after maturity, 670, 671.
 accommodation, 692.
 may be shown by parol evidence, 692.
 liable successively, 740.
 valid by parol evidence, 741.
 contract to pay the face of the note, 742.
 with damages, 742.
 interest, 742.
 not attorney's fees, 742.
 surety liable before accommodation indorser, 742.
 right to indemnity from maker, 743.
 his liability is a "debt," 743.
 and subject to attachment, 743.
 not a surety, 744.
 unless he sign as an accommodation, 744.
 or such intention be shown, 744.
 "surety" added to signature, 744.
 not a guarantor, 745.
 discharged by payment or satisfaction, 772.
 failure of banker to appropriate deposit, 761.
 cannot, at common law, compel the holder to first exhaust collaterals, 771.
 holder surrendering the collateral discharges the, 771.
 improper sale of collaterals, 771.
 discharge by release or in bankruptcy, 769, 770.
 by renewal without his indorsement, 1568.
 by extension, 767, 768, 1568.
 reserving rights against maker, 767, 770.
 negligence or release of collateral, 771.
 part payment by indorser, 1411.
 payment by indorser, 1429, 1430.
 may bring action against maker after payment, 1430, 1431, 1590, 1643.
 payment by indorser after judgment, 1432.
 entitled to indemnity, 743.
 liability of acceptor to, on payment by, 1433.
 entitled to be subrogated to collateral held for payment of paper, 1434.
 payment presumed from possession of, 1476.
 payment by, to bar statute of limitations, 1629.
 action by indorser, 1643, 1644.
 in name of indorser, 1334.
 plaintiff's indorsement canceled, 1644.
 damages recoverable, 1729.
 against indorser, 1662.
 when brought, 1587-1590.
 is liable for interest, 1705.
 liability of indorser used as set-off, 1852.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

INJUNCTION,

- against transfer, 1687.
- in violation of escrow, 229.
- suit, 1688, 1689.
- at instance of an indorser, 1821.
 - see "Equity."

INLAND BILLS,

- what, 3.
- defined, 232.
- originated in England, time of Charles II., 232.
- generally drawn in single parts, 234
- every bill is prima facie an, 235.
 - see "Bills of Exchange"; "Foreign Bills."

"INNOCENT PURCHASER,"

- usury law of Minnesota, 986 n.

INSANITY,

- see "Lunatics."

INSOLVENCY,

- discharge in, 770, 1833.
- effect of foreign discharge, 57, 1833.
- of drawer no excuse for want of due demand or notice of dishonor, 1329-1332.
- application of collateral security to payment of insolvent's debts, 1507.
- assignment by husband carries wife's note, 322.
 - see "Bankruptcy."

INSTALLMENTS,

- acceptance may be payable in, 626.
- maturity of note payable in, 1047.
- when overdue, the note is overdue, 1047.
- actions upon paper payable in, 1047, 1589.
- statute of limitations runs from when, 1047, 1619.
- of interest not entitled to grace, 1058.
- presentment on maturity of installment necessary to hold indorser, 1067.
 - 1091.
- must be averred and proved, 1071.
- notice of dishonor on nonpayment of each installment, 1198.
- interest on each installment becomes due with it, 1705, 1706, 1708.

INTEREST,

- rate of place of payment may be chosen, 43.
- unexpressed determined by *lex loci contractus*, 41, 1707.
- determined by place of delivery, 41.
- lex loci solutionis*, 46.
- lex loci rei sitæ*, 47.
- drawer's liability for, determined by *lex loci contractus*, 38.
- acceptor's liability for, determined by *lex loci contractus*, 41.
- presumption as to foreign law, 41, 27.
- after maturity, at rate fixed by *lex fori*, 41, 56, 1712.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

INTEREST—Continued.

after an injunction granted, 1711.
 formerly on beginning of suit, 1711.
 but now reckoned down to final judgment, 1711.
 after maturity, 1712.
 at legal rate, unless otherwise stipulated, 1712.
 at same rate as stipulated before due, 1712.
 statutory rate after maturity, 1712, 1713.
 higher rate reserved after maturity, 1713, 104.
 by parol evidence no interest after maturity, 1713.
 note payable in six months "without interest," 1713.
 is not a penalty, but stipulated damages, 1713.
 is not usurious, 1713.
 does not affect negotiability, 1713.
 higher rate waived by receiving interest at original rate, 1713.
 relinquished by applying payment to extinction of principal, 1497.
 see "Exchange"; "Usury."

INTEREST COUPONS,

payable to bearer, though detached, are negotiable, 91.
 detached and no payee expressed, not negotiable, 150.
 draw interest, 1706.

INTERPLEADER,

when equity will entertain a bill of, 1685.

INTERPRETATION,

governed by the *lex loci solutionis*, 31.

"I O U,"

is a sufficient promissory note, 90.
 sufficient designation of the payee, 152.
 parol evidence admissible to show person intended, 152.
 not the subject of a gift *causa mortis*, 810.

"I PROMISE,"

corporation principal intended, 142.

J

JOINT AND SEVERAL PROMISE,

comprises several notes, 149.
 as to the remedy, 149.
 is joint "or" several, 149.
 "we or either of us promise," 143.
 alteration as to one discharges all, 149 n.
 one valid and other invalid, 149.
 alteration by adding signature, 149.

JOINTLY AND SEVERALLY,

indicating liability of corporation or agent, 143.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

L

LACHES,

- in presenting to an administrator may bar set-off, 1851.
- in setting up failure of consideration, 544.
- excuses for, in making demand and giving notice of dishonor, see "Presentment for Payment."
- see "Negligence"; "Notice of Dishonor."

LAW AND FACT,

- questions of fact for a jury:
 - dissent of partner to contract of firm, 400.
 - whether an instrument was given for a firm debt, 410.
 - agency of wife for husband, 318.
 - reduction to possession by husband of wife's choses in action, 326.
 - whether wife signs note as surety for her husband, 291.
 - agent's authority, 362, 363.
 - as indorser, 774.
 - reasonable time for filling a blank bill, 183.
 - what constitutes performance of a condition, 95, 229.
 - delivery of note or bill, 225.
 - intention to make memorandum part of a note, 123.
 - circumstances of making, 190.
 - diligence against maker, 763.
 - character of holder, 986, 992.
 - due caution, 996, 997.
 - good faith, 1000, 1025, 1683.
 - whether a guaranty has been accepted, 853.
 - notice of acceptance of guaranty within a reasonable time, 854.
 - date of guaranty, 868.
 - whether guaranty forms part of the original contract, 871, 873.
 - consideration for a guaranty, 878.
 - reasonable demand, 882.
 - notice of maker's default, 887.
 - negligence that will discharge guarantor, 888.
 - due diligence, 891.
 - relation which parties have agreed to assume towards one another, 890.
 - consent by a surety to an extension, 968.
 - ratification of co-maker's promise, 446.
 - fraud, 448, 1814.
 - want of consideration, 451.
 - "reasonable time for forbearance," 491.
 - alteration of contract, 543.
 - whether note was given as security or for a premium of insurance, 565 n.
 - for a wager, 566 n.
 - discount or usury, 526 n.
 - due diligence in ascertaining residence of drawee, 581.
 - completeness of an acceptance, 606.

reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

D FACT—Continued.

attention as an acceptance, 620 n.
 whether condition of acceptance has been performed, 625.
 cancellation of acceptance, 638.
 waiver of an acceptance, 640.
 negotiability by custom, when *lex mercatoria* uncertain, 655.
 undated indorsement, 686 n.
 blank indorsement whether sale or loan, 691.
 reasonable time for maturity of demand, 1041.
 or note to be in circulation, 1044.
 on presentment for payment, 574, 585, 1098.
 circumstances under which a check was taken, 1045.
 diligence in sending notice of dishonor, 1061.
 attention of indorser, 1206.
 whether an indorser has been misled by a notice of dishonor, 1219,
 1224 n.
 or misdescription in notice, 1221.
 authority of agent to receive notice of dishonor, 1247.
 reasonable time in giving notice of dishonor, 1251.
 ascertaining residence of drawer, 1252.
 whether notice of dishonor was left at office or place of business,
 1276, 1123 n.
 due diligence in ascertaining residence of indorser, 1281, 1286, 1288.
 whether holder knew of removal of indorser's residence, 1282, 1290.
 reasonableness of notice of dishonor, 1286 n.
 service of notice of dishonor, 1297.
 receipt of notice of dishonor, 1272, 1301.
 whether address was placed on paper by indorser or by his authority,
 1303 n.
 evidence that notice of dishonor was sent, 1312.
 sufficiency and credibility are, 1314.
 promise to pay as evidence of notice given, 1316, 1317.
 subsequent conduct of indorser, 1318.
 sufficiency of excuse for demand or notice, 1322.
 diligence in making inquiry for maker or acceptor, 1334.
 reasonable expectation that bill will be paid, 1350.
 attention to waive demand and notice, 1368, 1383.
 waiver of demand and notice, 1368.
 promise after laches as evidence of waiver, 1371.
 knowledge of facts on which liability depends, 1378.
 such knowledge may be inferred from circumstances, 1378.
 what is sufficient evidence of waiver, 1390, 1391.
 payment, 1392, 1473 n., 1478, 1482, 1624.
 applicability of funds for payment, 1393.
 reasonable time in returning a counterfeit bank note, 1403 n.
 payment or purchase, 1423, 1426, 1429, 1438, 1439.
 payment by maker or indorser, 1425.
 whether maker had notice of transfer before payment, 1463.
 appropriation of payments, 1490.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

LAW AND FACT—Continued.

- renewal or payment of a note, 1511 n., 1516.
- whether bill taken in satisfaction of debt, 1516.
- effect of a receipt is a question of intention, 1519.
- intention in receiving acceptance of partner, 1538.
- note of third person received in payment, 1535, 1543, 1551.
- acceptance of third person as payment, 1553.
- check received as payment, 1555.
- whether note intended to discharge lien, 1577.
- maturity, note payable "when able," 1604.
- identity of instrument referred to in an ambiguous letter, 1613.
- indorsee's authority to use indorser's name in a suit, 1634 n.
- excuse for nonproduction of original bill or note, 1702.
- interest, when the contract does not call for it, 1704 n.
- materiality of an alteration, 1743 n.
- whether the alteration is fraudulent, 1763.
- whether an alteration was to correct a mistake, 1765.
- consent to an alteration, 1767.
- negligence in leaving blanks, 1770.
- negligence and estoppel, 1782.
- alteration, when and by whom made, 1784.
- with what intention and under what circumstances, 1784.
- whether mark on note is a blank or an erasure, 1784.
- extension, 1819.
- intention to release, 1837, 1848.
- good faith of a release, 1845 n.
- negligence, 1873.
- liability assumed by indorser, 1903 n.
- questions of law for the court:
 - defect on face of paper, as notice, 1006.
 - laches by pledgee of collateral security, 804.
 - reasonable time for presenting a bill, 574, 585.
 - whether an acceptance is conditional, 622.
 - interpretation of waiver of an acceptance, if in writing, 640.
 - negotiability of bill, 655.
 - diligence in presenting a check, 1045.
 - reasonable time for maturity of note payable at indefinite time, 1049.
 - in presenting a bill or note for payment, 1068.
 - diligence in inquiring as to residence of acceptor or maker, 1128, 1178.
 - "reasonable diligence," "diligent inquiry" or "reasonable information," 1185 n.
 - sufficiency of the notice of dishonor, 1218.
 - reasonable time in giving notice of dishonor, 1251.
 - due diligence in ascertaining indorser's residence, 1286.
 - reasonableness of notice of dishonor, 1286 n.
 - reasonable expectation that bill be paid, 1350.
 - what acts amount to waiver of demand and notice, 1383 n.
 - the construction of an ambiguous writing, 1613.
 - diligence, 1662.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

LOST NOTE OR BILL,

- not presumed to be negotiable, 173, 1703.
- presumed to have been payable on demand, 119, 1703.
- and duly stamped, 1703.
- notice of loss, 1691.
- action on, 1692.
- on new promise to pay after loss, 1692.
- for a new consideration, 1692.
- indemnity required, 1693.
- tender of indemnity, 1694.
- action in equity, 1696.
- action at law, 1697.
- law and equity blended on, 1699.
- no recovery as lost, if in adverse possession, 1692.
- how pleaded, 1700.
- evidence of loss, 1701.
- affidavit of, 1701.
- when a question for the court, 1702.
- jury, 1702.
- evidence of contents, 1703.
- evidence may be proved by parol, 1703.
- especially if destroyed or lost by defendant, 1703.
- no defense in hands of bona fide holder, 1894.
- not sufficient excuse for laches in demand or notice of dishonor, 1333.
- payment of, 1416.
- funds provided and lost to pay note or bill, 1442, 1443.
- lost notes or bills as payment, 1525.
- trover for, 1682.
- trover not against bona fide holder of stolen or, 1683.

LOTTERY TICKET,

- as a consideration, 450, 513.

LOVE AND AFFECTION,

- consideration of, 453.
- transfer of note or bill for, 785.
- see "Consideration."

LUNAR MONTHS,

- time, when not governed by law merchant, is reckoned by, 1029 n.

LUNATICS,

- contracts of, are voidable, 256.
- may be avoided by personal representative, 256.
- subsequent grantee, 256.
- not by other party, 256.
- may be ratified, 256.
- voidable after inquisition, 256.
- distinction between executed and executory contracts, 256.
- liable for value of necessities, 256.
- note for necessities, 256.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

MAKER—Continued.

- parol evidence to vary his liability, 1901.
- may show he was a surety for co-maker, 1902.

MAKER'S NAME,

- manner of execution, 129-149.
- must be certain, 148.
- cannot be in the alternative, 148.
- fictitious, effect of, 148.
- so indorsed, acceptor liable, 148.
- joint and several note, 149.
 - see "Agent"; "Corporations"; "Executor"; "Partner."

MANDAMUS,

- when will lie, 1405.

MARGINAL FIGURES,

- expressing amount, 105.
- different from words expressing amount, latter control, 105.
- no part of the instrument, 105.
- foreign statutes, 105.
- limiting amount to be filled, 187, 105.
- blank amount, 187, 105.
- tearing off and filling larger amount equivalent to alteration, 187.

MARITIME LIENS,

- see "Liens."

MARK,

- is a sufficient signing, 64.
- American and foreign statutes, 64.
- sufficient indorsement, 702.

MARKS,

- peculiar, on paper as notice of its character, 1011.

MARRIAGE,

- note extinguished by, 317, 1832.

MARRIED WOMEN,

- note by, 458, 489.
- for husband's debt, 466.
- capacity at common law, 279, 282.
- by foreign law, 281.
- what law determines, 281.
- capacity determined by *lex loci contractus*, 35.
- bill or note at common law invalid, 282, 284.
- under recent statutes, 283.
- joint note with husband equivalent to note of husband, 284.
- promise as widow, 284.
- joint note without evidence for separate benefit, 284.
- not estopped by false representations, 272, 282.
- effect of recitals, 282 n.
- acceptance by, 471.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

MARRIED WOMEN—Continued.

reduction to possession, 319, 326.
may transfer by indorsement without liability, 288.
agent for husband, implied authority, 318.
agency of husband and wife for each other, 279, 318 n.
authority question for the jury, 318.
general power of attorney does not include accommodation paper, 318.
power to indorse note for son does not include execution of joint note, 354.
bill or note between husband and wife, 314-317.
causa mortis, 805.
suit by indorsee, 316.
question for the jury, 326.
promise after death of husband, 293, 1584.
after divorce, 293.
separate estate in equity, 300, 301.
not chargeable as surety, 289, 313.
equivalent to a feme sole, 300.
note or indorsement to wife prima facie separate estate, 300, 323.
though for loan by husband, 300.
contracts as to separate estate, 280.
American statutes, 279, 280.
foreign statutes, 281.
note payable "out of my separate estate," 292.
liability restricted by statute, 302.
what benefit sufficient, 302.
express charge, 302, 303, 313.
does not affect negotiability, 303.
indorsement with express charge is not a mortgage, 303.
express charge necessary for note, 303.
intention must appear, 284, 303.
may be in instrument attached, 303.
in collateral mortgage, 303.
implied charge of separate estate, 304-310.
signature by husband as "acting trustee," 304.
intention inferred from direct benefit, 284, 304.
agreement to pay out of separate estate, 304.
charge implied from living separate, 305.
from giving note or bill, 306.
joint note for debt of husband, 306.
restricted to cases of benefit, 307.
bound by contract for separate benefit, 307.
express charge or separate benefit must be proved, 307, 309.
without benefit no intention to charge, 308.
separate estate liable in equity for separate benefit, 309.
charge presumed from benefit in joint note, 310.
separate property purchased, 311.
credit to separate estate for farm supplies, 308.
separate benefit not presumed from separate estate, 280 n.
must appear, 312.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

MATURITY—Continued.

reckoned from delivery, 1037.
 action may be brought when, 1037.
 of paper payable "with interest from date," 1038.
 "with use," 1038.
 "on call," 1038, 1049.
 on demand, "but not to draw interest during my life," 1038.
 of demand notes, 117, 1029, 1039-1044.
 of checks, 1006, 1045, 1090.
 of overdue paper reissued, 1046.
 by installments when paper is payable in, 114 n., 1047.
 of interest, 118, 119, 1048.
 payable "annually," 1049.
 payable at an indefinite time is due in a reasonable time, 1049.
 reasonable time in such cases is a question of law, 1049.
 condition must happen before note can mature, 1050.
 several notes secured by one mortgage maturing on default in any, 1050a
 foreign statutes as to maturity, 1051.
 of sight bills, 1053.
 foreign fairs and holidays, 1052.
 how affected by "grace," 1054 et seq.
 presentment for payment after maturity, 1087.
 before maturity, 1090.
 indorsement after, is in effect a demand note, 672, 1046, 1098.
 accelerated by statute making new holiday, 1090.
 by warrant to enter judgment forthwith, 1050a.
 by option on default of interest, etc., 1050a.
 extended by option, 1050a.
 on call at option of maker (United States bonds), 1034.
 mistake as stated in notice of dishonor, 1225.
 notice of dishonor may be given on day of, 1258.
 must be given on day after, 1259, 1260.
 statute of limitations reckoned from, 1040, 1604, 1605.
 interest from, 1709.
 interest after maturity, 1712.
 higher rate of interest reserved after maturity, 1713.
 reckoned from protest for nonacceptance, 608.
 acceptance may be after, 596.
 payment before, 680.
 at, 682.
 no set-off until after, 1857.
 defenses against purchaser after, 1879, 1880.
 set-off against purchaser after, 1881.
 parol evidence not admissible to extend, 119, 120, 1898.
 nor collateral memoranda, 196.
 see "Extension"; "Grace"; "Holiday"; "Time of Payment."

"MAY,"

equivalent to "shall," 342.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

MERGER—Continued.

- affects parties to it, 1828.
- and prior parties, 1829.
- related parties, 1828.
- foreign judgment, 1828.

MESSENGER,

- service of notice of dishonor by, 1270, 1308.
- holder's damage may include the expenses of a special, 1716.

MISNOMER,

- payee intended may sue, 161.
- parol evidence admissible to explain, 165.
- person not intended cannot transfer, 166, 168.
- immaterial if identity is certain, 171.

MISREPRESENTATION,

- renders a note void, 1800.
- see "Fraud."

MISSPELLING,

- in the indorsement of the payee's name immaterial, 165.

MISTAKE,

- in amount may be corrected, 106.
- an omission of the words "or order" may be corrected, 177.
- a fresh stamp not necessary in England, 177.
- as to date, affects bona fides of purchaser, 1034.
- corrected by parol evidence, 1046.
- immaterial if there is no doubt in amount payable, 104.
- cured or aided by marginal figures, 105.
- omission of seal may be shown by parol evidence, 78.
- note by, 458.
- indorsement omitted by, 792.
- may afterwards be supplied by suit in equity, 793.
- purchaser has no authority himself to supply missing indorsement, 793.
- payment indorsed on paper by, 1479.
- payments made by, may be recovered, 1483, 1484, 1742.
- not for mistake of law, 1484.
- demand necessary, 1483.
- condition omitted, 1802.
- alteration by, 1765.
- court of equity may grant relief on the ground of, 1830.

MONEY,

- as a gift causa mortis, includes a note, 809.
- payment in, 1398.
- agents can receive payment only in, 1454.
- bills must be payable in, 96-102.

MUNICIPAL BONDS,

- see "Bonds"; "Municipal Corporations."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

MUNICIPAL CORPORATIONS,

- have many of the powers of private corporations, 336.
- have powers incidental and necessary to their existence, 336.
- what are corporate purposes, 336.
- may bind themselves by simple contracts, 336.
- may give a negotiable note under seal, 336.
- note to officer is to the corporation, 157.
- may sue in the name of his successor, 157.
- cannot give bill or note without express statutory authority, 338, 340.
- or clearly implied in exercise of express powers, 338, 340.
- cannot issue bonds without express authority, 338.
- what is express authority, 338.
- implied authority to issue bonds, 339.
- unauthorized bonds void in hands of bona fide holder, 343.
- cannot issue bonds to aid in construction of railroad, 339.
- power to contract debt implies power to make commercial paper for it, 339.
- distinction in power to issue negotiable and nonnegotiable instruments, 340.
- statutory requirements must be strictly followed, 341, 342.
- if authorized to issue a note, a bond is unauthorized, 341.
- void, when statute falls under constitutional prohibition, 342.
- legislature may ratify contract which is irregular or ultra vires, 347.
- but not bonds void for exceeding constitutional limit of amount of debt in authorizing act, 347.
- or for want of required consent of taxpayers, 347.
- proofs as to obtaining consent of taxpayers presumed sufficient, 347.
- and if made according to the requirements of the statute, it will be conclusive in favor of a bona fide holder, 347.
- presumption as to validity, 339.
- effect of judgment as to validity of coupons, 345.
- defense of unlawful issue, 343, 389.
- irregular execution, 344.
- diversion of proceeds, 343.
- estoppel by recitals, 345 et seq.
- corporate acts, 346.
- ratification by later statute, 347.
- see "Estoppel."
- recovery of money paid for invalid bonds, 342, 339 n.
- municipal officers, 372.
- see "Agent"; "Estoppel."

MUNICIPAL WARRANTS,

- when negotiable, 91, 337, 389.
- authority of the officer giving, is always open to examination, 337.
- if issued ultra vires, cannot recover, 337.
- cannot be recovered in replevin from a bona fide holder, 337.
- bona fide holder liable to defense of issue without authority, 389.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

N**NAME,**

must appear in instrument or signature, 129.
cannot be in the alternative, as "J. C., or else H. B.," 129.
assumed name sufficient, 129.
initials sufficient, 129.
partners should sign firm name, 130.
partnership name same as individual name, 130.
prima facie individual act, 130, 130e.
principal should appear, 131.
public officers, exceptions to rule, 132.
execution by executors, administrators, etc., 134.
signing by "surety," 134.
 see "Administrators"; "Agents"; "Corporations"; "Drawee's Name";
 "Executors"; "Maker's Name"; "Partners"; "Payee's Name."
action in what name, 1634, 1655.
suit by assignee in his own name, 1639.
executor in his own name, 1642.
when holder may bring suit in his own name, 1653, 1654.
action by agent in his own name, 1657, 1658.
trustee in his own name, 1659.

NATIONAL BANK,

 see "Corporations"; "Usury."

NE EXEAT,

 when court of equity will grant, 1685.

NEGLIGENCE,

causing damage to guarantor will effect his discharge, 888, 890.
is a question for the jury, 888.
in proceeding against principal discharges surety, 928, 929.
as to collaterals discharges surety, 930, 952.
is not equivalent to mala fides, 751.
in omitting indorsement, 792.
by pledgee of collateral security, 804.
as affecting a bona fide holder, 996 et seq.
in presentment for payment, 804, 1091, 1097.
making presentment on the fourth day of grace, 1055.
in presenting check for payment, 1073.
banks not liable for notary's negligence, 1078.
presentment in accordance with known custom of local banks, 1088.
collecting bank liable for, 1103, 1105 n.
laches in foreign protest, 1160.
collecting agents liable for not giving notice of dishonor, 1198, 1460.
in giving notice of dishonor, 1199, 1224, 1250.
notary, when not liable, 1240.
in ascertaining residence of party notified, 1252.
postmaster not liable for causing notice of dishonor to be delivered too late,
1269.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

NEGOTIABILITY—Continued.

- receiver's certificate, 90.
- coupons, 91, 150, 336, 653.
- parish warrants in Louisiana, 91 n.
- county warrants in Illinois, 91 n.
- bank deposit book not, 89.
- stock certificate not, 89.
- municipal warrants, 91, 337.
- if made expressly, in form will be, 337.
- government voucher not, 91 n.
- if conditional not, 92.
- American statutes, 92.
- effect of subsequent performance of the condition on, 95.
- in money only, 96-102.
- not if payment is out of a particular fund, 107.
- unless fund is for reimbursement only, 108.
- not if time of payment is uncertain, 110.
- conditional, 111, 112, et seq.
- not unless payable at a bank, 128.
- payee's name in the alternative or conditional, 155.
- note to "A. B., trustee," 158, 174.
- negotiable at certain bank, authority to pay clear of set-off, 177.
- does not affect negotiability, 177.
- "value received" unnecessary, 180.
- destroyed by memorandum of "foreign bills," 195.
- not affected by express charge on separate estate of wife, 303.
- what instruments are, 174-176, 652.
- bill payable "to A., or order," 652.
- payable to bearer, 653.
- holder, 174, 653.
- "A., or bearer," 175, 654.
- note payable "to the bearer, A.," 160, 175, 653.
- does not lose its character by a special indorsement, 655.
- may become nonnegotiable, 655, 656 n.
- how affected by a conditional indorsement, 723.
- a restrictive indorsement, 724.
- an indorsement "without recourse," 722.
- "for collection," 726.
- paper is subject to attachment, 729.
- instruments may be the subject of gifts causa mortis, 809.
- affects jurisdiction of federal courts, 92.
- see "Nonnegotiable Instruments."

NEGOTIABLE WORDS,

- unnecessary in bill to king or government, 174.
- what necessary, 173.
- "order," "bearer," when necessary, 174.
- equivalent words, 174, 653, 654.
- "or his order" added is an alteration, 182 n., 1750.
- acceptor may strike out, 174 n.
- see "Negotiability."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

NOTARY PUBLIC—Continued.

notarial record of protest as evidence, 1172, 1176.
 certificate of protest is not evidence of acts of, performed by him in another state than his own, 1173.
 official seal unnecessary to notice of dishonor, 1219.
 may give notice of dishonor, 1237.
 though not part of his official duty, 1237.
 when not liable for negligence in giving notice of dishonor, 1240.
 in Kentucky, competent witness to prove that he did not know the indorser's address, 1285.
 notarial certificate and record as evidence, 1310, 1311.
 fees recoverable as part of plaintiff's damages, 1716.
 may be recovered against the indorser, 1716.
 see "Agent"; "Evidence."

NOTICE,

of limit of agent's authority, 388.
 that bill was accepted for debt of old firm, 397.
 construction of limited partnership, 406.
 firm note given for individual debt of partner, 407-413.
 onus is on the firm to prove, 413, 421.
 may be shown under general issue, 421, 423.
 what is not, of the accommodation character of a note, 418, 419.
 of dissolution of partnership, 436.
 implied by note signed "in liquidation," 437.
 of amount left blank defeats recovery when authority exceeded, 137.
 "trustee" equivalent to, 158.
 absence of indorsement by payee is, of equities, 789.
 by surety to sue should be given to pledgee, 796.
 notice of sale by pledgee should be given to pledgor, 802.
 of transfer, when required, 820, 824.
 what is not sufficient, 1463.
 Vermont law, 821.
 sufficient if given to one of several joint and several makers, 821.
 or to an accommodation indorser, 821.
 to surety not necessary, 821.
 should be given by indorsee, 821.
 or his collecting agent, 821.
 inures to the benefit of a subsequent indorsee, 821.
 knowledge is equivalent to notice, 821.
 notice of acceptance of a guaranty, 853, 855.
 reasonable notice of maker's default is a question for the jury, 887.
 "surety" added to signature is notice of its character, 896.
 by surety to holder to proceed against principal, 932, 933 et seq.
 as affecting bona fide holder, 1002 et seq.
 see "Bona Fide Holder."
 judicial, that third day of grace is a Sunday, 1090.
 courts take judicial, of banking hours, 1093.
 to maker to call at bank and pay note, 1135.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

NOTICE OF DISHONOR—Continued.

acceptor, 1211.

drawee accepting, payable at a certain banker's, 1211.

American statutes, 1212-1218.

foreign statutes, 1217.

not necessary when note received in absolute payment, 1561.

indorser entitled to notice, though drawee without funds of drawer, 1355.

necessity determined by what law, 32, 52.

upon payment for honor, 1194, 1195.

form:

sufficiency determined by what local law, 32, 1218.

is a question of law, 1218.

a formal document is not necessary, 1219.

a mere letter is sufficient, 1219.

when knowledge is sufficient, 1219.

or a verbal notice, 1219.

by leaving word at drawer's or indorser's office, 1219.

or by showing bill with notarial marks, 1219 n.

not by leaving note with an indorser, as attorney, to collect, 1219 n.

written notice should be signed by party giving it, 1219.

signature may be printed, 1219.

but telling from whom it comes is sufficient, 1219.

or letter heading on paper, 1219.

notary's official seal not necessary, 1219.

requisites of notice, 1220 et seq.

should be dated, 85, 1220, 1221.

address to party notified, 1220.

address when indorser has died before maturity, 1220.

should state holder's name, 1221.

and the place where the note is to be found, 1221.

not necessary to state for whom given, 1221.

may be in agent's name, 1234, 1236.

should state liability of person notified, 1222.

may be implied from the notice itself, 1222.

description of the instrument, 1220-1225.

best description is a copy of the instrument, 1223.

misdescription which does not mislead is not material, 1223.

misrecital or omission of name, 1224.

misdescription as to the amount, 1224.

description of date and maturity, 1225.

should state demand, 1226.

or facts constituting excuse, 1226.

that bill was "duly presented" is sufficient, 1226.

that it was presented "at the office of the maker," 1226.

should appear that presentment was made at proper time, 1226.

should state dishonor, 1220, 1227, 1228.

what is sufficient, 1230-1232.

should state protest when it is necessary, 1229.

threat of legal proceedings as a statement of dishonor, 1231.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

NOTICE OF DISHONOR—Continued.

- to all joint indorsers except partners, 1342.
- to joint and several indorsers, 1242 n.
- to all prior parties, 1240.
- to executors of deceased joint indorser, 1242.
- to partners, 1242.
- to one of several partners is sufficient, 1242.
- even after dissolution or death, 1242.
- after notice of death, to surviving partner, 1242.
- to trustees of old firm, 1242.
- notice to bankrupt or his assignee, 1243.
- to messenger, if bankrupt absconded and no assignee appointed, 1243.
- to insolvent under state laws or his assignee, 1243.
- to insolvent corporation, 1243.
- to guardian of a lunatic, 1243.
- to husband, 1243.
- to executors, 1244.
- to one of several executors, 1244.
- to address of deceased indorser, 1244.
- "to the legal representatives" or "to the executors," 1244, 1245.
- to executor named in will before probate, 1245.
- though he decline to act, 1245.
- not to deceased indorser's brother-in-law, 1245.
- although afterwards appointed administrator, 1245.
- to an agent, 1246-1248.
- authority to receive notice may be implied, 1247.
- should be proved if required, 1247.
- to cashier of bank, 1248.
- to one in charge of indorser's office, 1248.
- or of the office of his administrator, 1248.
- to indorser's bookkeeper, 1248.
- to his wife at his store, 1248.
- not to an attorney or solicitor, 1246.
- or to "financial agent" of indorser, 1246.
- or to an attorney in fact, 1246.
- not to one indorsing "in need at A. B.," 1246.
- not to one found at office or residence, but unable to understand,
1248, 1296 n.
- or known to be there accidentally or for the time only, 1248.
- not to barkeeper in indorser's absence, 1248.
- nor to clerk met in the street, 1248.
- to member of family, 1249.
- to a fellow boarder, 1249.
- to landlady of boarding house, 1249.
- to a servant, 1249.
- to a slave, 1249.
- not to brother or son-in-law, 1249.
- not to a servant in a sealed envelope, with instructions not to open
it until the indorser returns, 1249.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1301; vol. 3, §§ 1302-1904.]

NOTICE OF DISHONOR—Continued.

- at former place of business, where indorser dies before maturity, 1274.
- when place of business is closed, 1275, 1276.
- estoppel against denying it to be his place of business, 1276.
- mailing to residence, should be addressed to post office of that town. 1278.
- or the nearest post office, 1279.
- or post office where indorser usually receives his letters, 1279.
- residence presumed from date, 81, 1280.
- presumed not to have been changed, 1281.
- presumed as addressed in notice, 1185 n.
- ordinary diligence necessary to find new residence if change known. 1281.
- diligence is a question for the jury, 1281.
- actual receipt at former residence, 1281 n.
- knowledge presumed, if change of residence notorious, 1282.
- absence from residence, 1283.
- notice to temporary residence, 1284.
- inquiry for residence if not known, 1285.
- must be promptly made, 1285.
- burden on holder to show due diligence in inquiry, 1285, 1301 n.
- such diligence not presumed, 1285.
- is sufficient, if sent to wrong address after diligent inquiry, 1286.
- subsequent information as to correct address immaterial, 1286.
- what is due diligence in inquiry, 1287-1290.
- presumption that the indorser's residence is known, 1287, 1288.
- inquiry of former holders, 1288.
- inquiry of other parties, 1289, 1290.
- mailing to county town, 1291.
- though other post offices nearer residence, 1291.
- to particular address in city, 1291.
- to neighboring town, 1292.
- to either of several post offices, 1292.
- to post office where mail usually received, 1293, 1294.
- nearest residence, 1294.
- usual post office presumed to be the nearest, 1294.
- to post office where indorser will get it most speedily, 1294.
- to place designated by drawer or indorser, 1295.
- though he may have residence or business elsewhere, 1295.
- and not the nearest post office, as required by statute, 1295.
- manner of giving:
 - may be served personally, 1296.
 - or by leaving at residence or place of business, 1296.
 - or by mail or special messenger, 1296, 1300, 1308.
 - presumed to have been served personally, 1296.
 - slipped under door of house or office, 1296.
 - or in keyhole of residence, 1296.
 - put in conspicuous place, 1296 n.
 - left with nearest neighbor, 1296.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

NOTICE OF DISHONOR—Continued.

- subsequent promise may be a waiver and not an admission, 1316.
- part payment, 1317.
- is only prima facie evidence, 1317.
- presumption from other circumstances, 1318.
- conduct of indorser or drawer, 1318.
- notice to drawer or indorser to produce the notice of dishonor, 1319.
- proof by a duplicate, 1319.
- or by parol evidence, 1319.
- by copy of letter without notice to produce original, 1319.
- official postmark is prima facie evidence of the time of mailing, 1319.
- express waiver dispenses with proof, 1319.
- may be contained in a collateral instrument, 1319.
- waiver and excuse for laches in giving:
 - in general the same as for not making demand, 1320 et seq.
 - see "Presentment for Payment."

NOTING,

- consists of what, 1137.
- should be done on the very day of dishonor, 1140.

NOVATION,

- consideration for, 471.
- note illegal, made legal by, 534.
- original debt assumed by guarantor by, 873.
- discharge of surety by, 942.
- equivalent to a release, 1840.
- what amounts to, 1544, 1546.

O

"OBLIGE,"

- immaterial in bill, 87.

"OLD STYLE,"

- what is, in reckoning time, 1030.
- still used in Russia, 1030.
- when determined by the place of payment, 1030.

OMISSION,

- in body of note of the amount, cured by marginal figures, 105.
- in designating the amount immaterial if no ambiguity, 106.
- in pleading, time of payment material, 109, 110.
- in designating time of payment immaterial if no ambiguity, 110.
- drawee's name supplied by acceptance, 171, 185.
- "order" by mistake may be corrected, 177.
- no authority from blank to supply, 182, 186.
- or make alteration, 182.
- "first," "second," etc., liable to bona fide holder on all, 181 n.
- payee's name supplied, 185.
- drawer's name supplied, 185.
- maker's name supplied, 185.
- partial date supplied, 186.

- [Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

ONUS PROBANDI—Continued.

- bank bills stolen before being put into circulation, 567.
- that maker was sick or intoxicated at time of making note or bill, 567.
- fraud, 567, 1814.
- a condition not appearing on bill, 625.
- condition performed, 111, 625.
- that indorsement, made after note, was before suit brought, 686.
- that note payable one day after date was transferred after maturity, 686.
- good faith, 567, 1025, 1683.
- when fraud is shown, 425, 472, 1026, 1808.
- fraud on partnership, 423.
- partner's consent to accommodation, 413.
- existence of partnership, 395 n.
- sufficient consideration for guaranty given after making of note or bill, 878.
- waiver of notice of protest by guarantor dispenses with proof as to damages, 886.
- that guarantor was not injured by indulgence, 888.
- agent's authority, 393.
- to pledge for his own debt, 361 n.
- to receive notice of dishonor, 1247.
- to bind corporation, 368 n.
- that acceptor was ready to pay at time and place agreed, 1084.
- that demand was made at a reasonable hour, 1095.
- and in reasonable time, 1098 n., 1560.
- that drawer was not damaged by laches in presentment, 1103 n.
- that holder was negligent in inquiring for residence, 1112.
- that protest was not made for the holder, 1162.
- of proving that drawer of check was not injured by want of notice, 1200.
- that accommodation drawer suffered special damage by laches, 1202.
- that notice of dishonor was given, 1285.
- that indorser has been misled by notice of dishonor, 1223.
- that notice of dishonor to resident in the same place might have been received next day, 1260.
- that notice of dishonor was duly received, when unusual manner of service is adopted, 1308.
- that notice of dishonor was given in time, 1250, 1272.
- especially if received too late, 1314.
- to avoid promise for mistake or fraud, 1317.
- excuse for want of due demand or notice, 1322.
- e. g. by transfer of maker's property, 1343.
- or no reasonable expectation that bill would be paid, 1348, 1352.
- drawer injured by want of notice, 1348.
- waiver of demand and notice, 1367.
- promise to pay after dishonor made in ignorance of laches, 1379.
- that no damage was recovered by collecting agent's negligence, 1461.
- that payment, of which indorsee had no notice, was made before transfer.
- 1464.
- payment, 1473.
- that overdraft was paid by mistake, 1483.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

OWNER,

action by, 1649.

without indorsement, 1653, 1654.

may bring trover against wrongful holder, 1653.

P**"PAID,"**

so marked by mistake, 1259, 1479.

PAPER MONEY,

power of the United States to issue, 349 n.

PAROL EVIDENCE,

admissible to show:

meaning of blank indorsement on sealed instrument, 70.

omission of seal by mistake, 73.

seal intended for one or more makers, 73.

corporate act intended by seal, 73 n.

date, 77, 78, 226.

date of acceptance, 83.

time of delivery, 77, 110.

mistake in date, 78, 1049.

in local date, 81.

Confederate currency intended, 102, 497, 1737, 1738.

December instant intended by "December next," 110.

usage as to days of grace, 110.

usage of trade, 110.

principal intended by signing "A. B., agent," 133.

principal intended as payee, 156.

charging to his account, 140.

principal liable, 147, 1897 n.

agent not liable, 147, 1897 n.

payee in "I. O. U.," 152.

action by principal on unindorsed note to agent, 156.

principal intended by designating agent payee, 157 n.

liability of principal or agent, 133, 147.

holder intended by assumed name, 162.

meaning of misnomer, 165.

character of signature across face, 171 n.

circumstances of making memoranda, 190.

as to delivery, 220, 1896.

conditional delivery, 227, 230, 231.

for other signatures, 227.

delivery in escrow, 227, 1901.

undisclosed coverture of maker, 282 n.

married woman's note for debt of her husband, 286.

agent's authority, 393.

though acting under a special written authority, 393.

guaranty intended over a blank indorsement, 373.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PAROL EVIDENCE—Continued.

as to time of payment, 186.
meaning of ambiguous acceptance, 624.
due diligence against maker on nonnegotiable note, 659.
plaintiff's initials different from those on the paper, 1632.
contents of a lost check, 1609.
of lost bill or note, 1703.
agreement that no interest should be charged after maturity, 1713.
value of note payable in a particular currency, 1733.
note for "dollars" to be paid "in good money after the war," 1736.
meaning of erasure, 1765.
consent to alteration of a note, 1767.
parol authority to add "whatever counsel might suggest to make it legal," 1767.
circumstances of making an alteration, 1784.
agreement postponing demand, 1097.
place of payment agreed upon, 1127.
at what bank note was presented for payment, 1164 n.
of a notice of dishonor, 1218, 1319.
that indorser has not been misled by notice of dishonor, 1223.
agreement that notice should be given at bank where paper is negotiable, 1295.
waiver of demand and notice, 1368, 1369.
was intended, 1365.
agreement to pay in work, 1408.
whether transaction is purchase or payment of bill, 1438, 1439, 1632 n.
payments on notes referred to in a mortgage, 1473.
meaning of a receipt, 1477, 1519 n.
of marks on check indicating payment, 1479.
intention with which note was given, 1518.
written acknowledgment of debt, 1620.
payment, 1624.
written receipt by deceased maker, 1624.
agreement for, and payment of, usurious interest, 1798.
alleged fraud, 1814.
fraud, illegality, alteration, or forgery, 1896.
whether note was given in satisfaction or as security, 1899.
that judgment was confessed to an indorser for collateral security, 1899.
agreement for, and payment in, timber, 1899.
that note was given as collateral security for performance of trust, 1899.
release, 1900.
rebate, 1900.
subsequent agreement modifying, 1899.
application of collateral, 1899.
agreement that plaintiff would not hold accommodation maker, 1901.
that one signing under maker intended to be co-maker, 1901.
to vary an indorsement, 1903.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PAROL EVIDENCE—Continued.

intention of one signing as indorser to be liable as maker without notice of dishonor, 1211.
 waiver of demand and notice, 784.
 that waiver printed on back of note was not part of it, 1364.
 that a waiver of protest meant waiver of demand, 1366.
 verbal contemporaneous waiver of demand and notice, 1369.
 waiver of diligence, 1903.
 other money than specie meant, 1399.
 that "current funds" meant depreciated bank notes, 1400.
 contemporaneous agreement that note shall be paid to other than payee, 1445.
 that stock certificate described in note was to be regarded as payment, 1482.
 agreement on transfer of bond for priority against proceeds of collateral, 1506 n.
 agreement that B. might sue as bearer of nonnegotiable note, payable to "A. or bearer," 1648 n.
 that collateral mortgage on which nothing was realized was sufficient at time of its assignment, 1678.
 meaning of figures in interest clause, 1704 n.
 higher rate of interest intended than that reserved, 1707, 1712 n.
 agreement to pay in Confederate currency, 1736.
 release, 1836.
 bill not included in a sealed release, 1843.
 contemporaneous agreement for renewals, 1820, 1898.
 or extension, 1898.
 that "legally due" meant "equitably due," 1897.
 how paper should be satisfied, 1899.
 that an existing debt should be used as a set-off, 1899.
 verbal agreement to release maker and surrender note, 1900.
 agreement to look to acceptor and discharge drawer, 1900.
 to hold one maker only, 1900.
 parol contemporaneous agreement, once admitted, is not open to further objection, 1900.
 liability of maker, 1901, 1902.
 indorser, 1903.
 that charter of insurance company controls note previously given, 1904.
 see "Evidence."

PARTICULAR FUND,

for payment destroys negotiability, 107.
 if referred to for reimbursement only, does not destroy negotiability, 108.

PARTIES,

relation of the, as notice of the character of the paper, 1014.
 on suit to collect collateral by pledgee not necessary to join pledgor, 796.
 pledgee may bring suit on collateral in his own name, 796.
 or in the name of the pledgor, 796.
 transfer by assignment, parties to action, 791.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PARTNERS AND PARTNERSHIP—Continued.

- implied, 437.
- affected by war as alien enemies, 251.
- liability when infant partners, 268.
- infants partners, action by and against, 278.
- there can be no delivery after dissolution, 221.
- married women partners, 279, 285.
- accommodation paper by, 416-420, 472.
- ratification by firm, 417.
- knowledge by partner that it is, 473.
- as guarantor or surety, 416.
- may give a valid bill to firm for bills receivable of the firm, 479.
- acceptance by, 593.
- acceptance admits the existence of a firm, 631.
- indorsement by one partner to the other for collection, 746.
- first indorser as against the second indorser cannot show that they were, 746.
- accommodation indorsement, 990.
- notice to, 1003, 1004.
- paper as notice of its character, 1014.
- firm having common partner, 153, 1014, 1015.
- new note from partner in payment of firm debt discharges retiring partner, 942.
- taking note of one and retaining original joint bill will not discharge other, 943.
- extension to partner assuming firm debts on dissolution discharges other partner, 954.
- consideration to the, 130.
- for debt of individual partner, 407 et seq.
- consent, when presumed, 409, 410.
- defenses, 408 et seq.
 - when admissible, 408.
 - when inadmissible, 411, 412.
 - burden of proving notice, 413.
 - fraud as a defense, 422.
 - dissolution, when admissible as a defense, 435.
 - see "Defenses."
 - violation of partnership agreement, 421.
 - power of individual partner to bind the firm by giving or indorsing commercial paper is often limited by agreement, 421.
 - such power is to be determined by such articles, 421.
 - except where purchasers without notice before maturity may be concerned, 421.
 - negotiation of acceptance given in violation of such agreement, in the hands of holder with notice, may be restrained by injunction, 421.
- burden of proof as to fraud, 423.
- presentment for payment by surviving partner, 1080.
- to partner, 1086.
- to their agents, 1086.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PAYEE—Continued.

executor, guardian, or trustee as, 440, 444.
state may be named as, 150.
action by, 1632.
presumed to be the owner from possession, 1632, 1651.
defenses against, 1875.
corporation, maker admits legal existence, 163 n.

PAYEE'S NAME,

must be certain, 150.
bearer or order sufficient, 150, 158, 174.
business name, 150.
cannot be to a person dead, 150.
administrator may sue on note payable to deceased person, 150.
implied by reference, 151.
American and foreign statutes, 169, 170.
fictitious, 161-164, 169.
blank, 167, 168, 185.
in sealed bond, 74 n., 168.
misnomer, 165.
ambiguity, 166.
in the alternative, 155.
determined by condition, 155.
agents, 156, 157.
parol evidence to show principal intended, 156.
identical with drawee or maker, 153.
without maker's indorsement, 153.
identity of maker and payee apparent only, 154.
inadvertently indorsed on the face, 154.
different persons, same name, 154.
prima facie the same, 154.
parol evidence to explain, 165.
effect on bona fides of making payable to order of maker or drawer, 154.
payee's official title, 157, 158.
is either a promissory note or an accepted bill, 154.
described, not named, 152.
"executors of A.," by description only, cannot sue after letters revoked.
158.
sue by personal representative, 158.
by successor in office, 158.
public official, 158.
sue by state, 158.
"assignee," "trustee," "sheriff," 158.
"cashier," 133, 157.
"A. B., or heirs," 155.
"A., or wife," 155.
trustees, or their collector, 155.
A., B., and C., or a major part of them, 155.
"or" construed "and," 155.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PAYMENT—Continued.

- presumption that funds of maker in holder's hands are applicable to note, 1393.
- by credit given, 1394.
- to agent or partner, 1395.
- by set-off against partner under agreement to apply on partnership note, 1395.
- in securities, 1396.
- by taking collateral, 795, 1396.
- legacy to creditor, 1397.
- debtor appointed executor, 1397.
- money or coin at its standard value, 1398.
- note payable in "dollars," 1399.
- or in "Confederate currency," 1399.
- in a designated currency, 96, 102, 1400.
- effect of U. S. legal tender act, 1401.
- in bank bills, 100, 1402.
- of an insolvent bank, 1403.
- counterfelt, 1403.
- bank note as payment or a set-off, 1404.
- Virginia coupons, 1405, 1406.
- in tokens, 1407.
- in merchandise, 101, 1407.
- in work, 101, 1408.
- with borrowed money, 1425.
- part payment, 1409, 1410.
- demand of receipt on payment, 1414.
- or of indorsement as receipt, 1414, 1739 n.
- surrender of paper on payment, 1415.
- if not surrendered is prima facie not paid, 1415.
- lost instruments, 1416.
- nonnegotiable instruments, 1417.
- surrender by mistake or fraud, 1417.
- surrender on payment before maturity, 1418.
- statutes requiring surrender on payment, 1419.
- by stranger, payment or purchase, 1438-1440.
- satisfaction, 1824.
- absolute or conditional, 464, 465.
- by bill, note, or check:
 - debtor's note is not, 1509, 1548, 1560.
 - unless by agreement, 466, 750, 754, 1509, 1512-1514.
 - note of municipal corporation, 1398.
 - of executor, 1510.
 - of agent, 1510.
 - by renewal, 1511, 1516.
 - in discharge of a higher security, 1512.
 - for smaller amount, 1512.
 - debtor's own note and draft of third person, 1512.
 - intention must be clearly proved, 1513.

[Reference is to sections. Vol. 1, §§ 1-597; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PAYMENT—Continued.

- check need not be received as a tender, 1556.
- sufficient, if not objected to, 1398.
- check of third person, 1557.
- lost check, 1558.
- certified check, 1558.
- check taken as cash, 1559.
- is not a payment if due diligence used, 1562.
- payable to order without indorsement, 787.
- damages to drawer presumed from laches in demand, 1073.
- by bill or note of other person, 1534 et seq.
 - agreement to receive as payment necessary, 1067, 1534.
 - may be implied from circumstances, 1534.
 - presumption is against payment, 1535.
 - taken upon debtor's responsibility, 1535.
 - entered on creditor's books as payment, 1535.
 - intention a question of fact, 1535.
 - transfer by pledgee, 803.
 - check of one of two joint debtors, 1554.
 - note of partner, 1536, 1537.
 - partnership renewals, 1538.
 - as to new or dormant partners, 1539.
 - by note of partnership after dissolution, 1540, 1541.
 - of partner after dissolution, 1542.
 - agreement implied from conduct of the parties, 1542.
 - creditor's knowledge of the dissolution, 1542.
 - distinction between payment of existing and of contemporaneous debt, 1543-1545.
 - note indorsed for an existing debt, 1545, 1547.
 - unindorsed note, 1546.
 - effect of laches in presenting, 1560, 1561.
- what is not payment, 588 n., 600 n., 1891.
 - in fraud of trust estate, 1392 n.
 - in violation of law, e. g. of an injunction, 1392.
 - surrender by mistake or fraud, 1417.
 - mere offer to pay, 1005, 1392.
 - upon surrender of note, 1415.
 - application of bank deposits, 1393.
 - set-off or recoupment, 1394.
 - crediting amount collected to an intermediate indorser, 1395.
 - especially where the indorsement is "for collection," 1395.
 - delivery of property with power to sell and apply the proceeds, 1396.
 - taking another note as collateral, 1396.
 - goods assigned by principal with agreement for possession on future notice, 1396.
 - mortgage from one joint maker with an absolute covenant to pay the debt, 1396.
 - taking collateral mortgage from maker, 1396.
 - unsatisfied judgment, 1396.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1331; vol. 3, §§ 1332-1904.]

PAYMENT—Continued.

- to married woman at common law, 321, 1447.
 - after divorce, 321.
 - to husband, 1447.
 - to guardian of infant or lunatic, 1447.
 - to alien enemy, 1447.
 - to bankrupt, 1447.
 - to assignee of bankrupt, 1447.
 - to executor, 1448.
 - to administrator of executor, 1448.
 - to heirs and children, at request of administrator, 1448.
 - to trustee, 1449.
 - to mortgagee of collateral mortgage, 1449.
 - to sheriff under execution, 825, 1449.
 - to authorized agent, 1444, 1450.
 - authority to receive may be implied from official position, 1450.
 - or other circumstances, 1450, 1451.
 - from mere possession, 1078, 1450.
 - without indorsement, 1450.
 - not of a nonnegotiable instrument, 1078.
 - to agent not in possession, 1450.
 - to unauthorized agent subsequently ratified by principal, 1452.
 - after authority revoked by principal, 1452.
 - crossed checks in England, 1453.
 - bank named as place of payment, 1451.
 - agents should receive only money, 1454.
 - not goods, note, or certificate of deposit, 1454.
 - in bank notes, 1455.
 - by check, 1456.
 - negligence of subagents, 1457, 1458.
 - collecting bank liable for the negligence of its correspondent, 1457.
 - to holder without necessary indorsement, 1462.
 - to original holder of note payable to bearer, 1462.
 - to payee after transfer, 1462-1464.
 - after notice of transfer, 1464.
 - as agent of indorsee, 1462.
 - to pledgor, 795, 1465.
 - to pledgee, 1465.
 - to attaching creditor, 1466.
 - to indorsee, 1467, 1468.
 - under restrictive indorsement, 1467.
 - after transfer to him has been rescinded, 1467.
 - under indorsement to several, 1467.
 - under forged indorsement, 752 n., 1468, 1469.
 - under married woman's indorsement, 288.
- when made:
- at any time on last day of grace, 1062.
 - should be made at maturity, 682, 1470.
 - may be made before or afterwards, 1470.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PAYMENT—Continued.

- or to wrong person of same name, 1166.
- after demand from defendant, 1483.
- by negligence of bank officers, 1483.
- no recovery if made by mistake of law, 1484.
- e. g. damages in re-exchange in excess of what law required, 1484.
- of payment obtained by fraud, 1485, 1891 n.
- of illegal payments, 503, 1485.
- payment by insolvent or bankrupt in violation of the statute, 1485.
- under forged signatures, 1486, 1487.
- notice of the forgery must be given promptly, 1488.
- of voluntary payments of usury, 531, 1484.
- appropriation of payments:
 - by debtor, 1489, 1497.
 - expressly, 1489.
 - or by implication, 1490.
 - is a question for the jury, 1490.
 - not to be changed afterward, 1489 n.
 - may prefer principal to interest, 1491.
 - or secured note, 1491.
 - as against surety, 1491.
 - notwithstanding other agreement between creditor and surety, 1491.
 - by creditor, 1492, 1493.
 - not to injury of debtor, 1492.
 - when to be exercised, 1492.
 - when once made cannot be changed, 1492.
 - not a new promise prima facie to bar statute of limitations, 1492.
 - may prefer simple debt to a specialty, 1493.
 - or note barred by statute of limitations, 1498.
 - or equitable or unstamped debt, 1499.
 - or debt which debtor declared he would not pay "until compelled by law," 1499.
 - of bank deposit, to debts due and not due, 1393 n.
 - application by law, 1494.
 - regard had to presumed intention of parties, 1494.
 - to the debt most burdensome to debtor, 1494.
 - e. g. to one that bears interest, 1494.
 - to earlier legal debt rather than later equitable one, 1494.
 - to oldest items, 1495.
 - to debts not due, 1496.
 - to interest, 1497.
 - to lawful debts, 1499, 1500.
 - absolute preferred to collateral debt, 1499.
 - illegal items due rather than legal ones not due, 1499.
 - to legal rather than illegal items of an account, 1500.
 - to individual or joint debts, 1501.
 - to secured debts, 1502.
 - creditor may prefer open account to a secured judgment, 1502.
 - the law will prefer bills and notes to judgments, 1502.
 - the civil law prefers a debt that is secured to one that is not, 1502.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PAYMENT SUPRA PROTEST—Continued.

- does not amount to satisfaction of bill, 1195.
- should only give notice to last indorser or to party honored, 1195.
- gives right of action against party honored, 1195, 1437.
- all prior parties, 1195, 1437.
- recovery against acceptor, 1195, 1437.
- unless for accommodation of drawer, 1195.
- foreign statutes, 1196, 1197.
- recovery of damages provided by statute, 1437.
- see "Acceptance Supra Protest."

PENAIL,

- is a sufficient writing, 60.
- indorsement, 702.

"PER PROCURATION,"

- is sufficient notice of agency, 388.

PLACE, LAW OF,

- see "Conflict of Laws."

PLACE OF PAYMENT,

- how determined, 26, 1441.
- uncertain, 1116.
- presumption from date, 46, 81, 124.
- from acceptor's domicile, 46, 122.
- drawee's address, 122.
- how designated, 1112.
- may be written over a blank acceptance, 588.
- should be designated, 121.
- municipal bonds payable in other state, 121.
- English promissory note under £20, 121.
- Bank of England notes, 121.
- foreign statutes, 121.
- prima facie accommodation paper if payable at drawer's residence, 122.
- may be designated in memorandum, 123, 126, 193, 581, 1112.
- memorandum not part of bill, 123, 193.
- alteration of memorandum, material, 123, 193.
- authority to fill blank, 123, 186.
- blank left for name of bank, 128.
- omission cannot be supplied, 182.
- mistake may be corrected, 124.
- agreement by parol, 124.
- parol evidence inadmissible as to place of payment, 124.
- several places named, 125.
- "at any bank in S.," 125.
- bank named as such is not agent for collection, 125.
- authorized to pay note on maker's credit, 125.
- when presentment there is necessary, 126.
- American rule as to presentment and pleading, 127.
- statutes, 125, 128.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PLEADINGS—Continued.

not sufficient to aver that payee knew one of the drawers to be a surety, 899.

in pleading a tender by principal, surety must aver continued readiness to pay, 944.

extension, he must allege that holder knew he was a surety, 955.

as consideration for extension, usury must be paid in advance, and so averred, 967.

declaring upon an acceptance which was given before bill was drawn, 597.
consent to, and notice of, qualified acceptance must be specially averred, 621 n.

performance of condition of acceptance should be averred, 625.

not necessary to aver presentment at particular time or place named, 626.
waiver of acceptance, 640.

note payable to "A. or bearer," 654.

nonnegotiable bill indorsed in blank, 655.

indorsements, 718, 773.

by a stranger, 833.

at common law, a note may be declared on as a bill, 739.

a plea setting up defenses must deny bona fides of holder, 1024.

in New York, purchaser of note by delivery before maturity need not aver indorsement by payee, 791.

objection to sale by pledgee for want of notice or of demand must be specially averred, 802.

answer of garnishee, 818.

intention of irregular indorser to become a joint maker or guarantor must be specially averred, 838.

plea of renewal of a note barred by the statute of limitations must show maturity of original note, 487.

discharge operating as want of consideration should be specially averred, 488.

plea of illegality in note sufficient without offer to return consideration, 534.

partial failure of consideration will not sustain averment of total failure, 539.

failure of consideration for want of title specially pleaded with averment either of want of title or eviction, 547.

by fraudulent warranty specially pleaded, 548.

not necessary to aver or prove a consideration in the first instance, 562, 564.

failure of consideration admissible under general issue, 564.

with notice of such defense, 564.

must be specially pleaded, 564.

not necessary to aver that plaintiff had notice of such failure, 564.

demand and notice to indorser must be averred in, 738.

acceptor with notice of fictitious payee is liable on common counts, 164.

paper maturing on a holiday, presentment, 1033.

averment that day of grace has expired before suit brought, 1062.

need not mention grace in stating maturity, 1062.

ference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

NGS—Continued.

entment for payment, how pleaded, 1067.

avermment of "due diligence" not sufficient, 1067, 1095.

the facts constituting such diligence should be specially averred, 1095.

iness to pay at time and place named must be pleaded with a
nder, 1070.

ote payable in installments, necessary to aver and prove demand,
71.

and of drawee and acceptor for honor should be averred, 1082.

payable at bank and refused there by acceptor will support aver-
ment of due demand of acceptor, 1082.

r falling due on Sunday, sufficient to aver that it was due according
its terms on that day and duly presented, 1088.

that demand was made "when due," 1088.

entment at place designated will support an averment of present-
ent to the drawee, 1110.

directed to a certain one of two places of business of the drawee,
ot sufficient to aver presentment "at the place of business of A. B.,"
ic., 1112.

rmment that bill was "duly presented" at place named in the accept-
nce, 1113.

against maker, presentment at place named need not be averred, 1117.

although note draws interest by its terms after maturity, 1117.

re of payment set out as part of description of note, 1117.

cial averment of demand at place designated, 1118.

diness to pay at place named must be specially pleaded, 1119.

rmment that bill was "duly presented" to acceptor at place named in
he acceptance, 1110, 1120.

ficient to aver presentment made to the acceptor's bookkeeper at his
lace of business, 1123.

enough to aver presentment at maker's residence in his absence,
when note payable at a designated bank, 1125.

per to set forth that paper was duly produced at time of present-
ment, 1131.

action against drawer for nonpayment, not necessary to aver that
bill had not been accepted on presentment, 1146.

test should be averred in the pleading, 1148.

t sufficient to aver that plaintiff protested the bill "or caused it to be
protested," 1148.

esentment and protest must be averred against acceptor supra pro-
test, 1187.

covery after payment supra protest on common counts, 1195.

tice of dishonor to drawer must be averred in action against him, 1201.

tice to indorser should be specially averred, 1204.

itement of "due diligence" not sufficient, 1204.

erment of dishonor of foreign bill and due notice given is sufficient,
1229.

ay describe notice of dishonor from later party as coming from
plaintiff, 1235.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PLEADINGS—Continued.

declaring against indorser, the time of notice of dishonor must be stated, 1250.

custom to send notice by mail proved without being specially averred, 1303.

promise to pay need not be specially pleaded, 1317.

may be shown under averment of due notice, 1317.

relied on to excuse demand or notice, should be specially averred, 1322.

joint interest as excuse for making demand must be averred, 1341.

that drawer had no funds or reasonable expectation of payment must be alleged and proved, 1348.

waiver of demand and notice of dishonor, 1367.

sufficient to aver that bill was paid "according to the custom of merchants," 1444 n.

to hold agent for negligently making demand on wrong day, the negligence should be particularly averred, 1460.

payment by bill or note, how pleaded, 1515.

sufficient to aver that bill or note given in payment is outstanding in hands of a third person, 1524.

that bill was given "in satisfaction" of debt, 1549, 1551.

of exchange was given in payment of a sealed bond, 1549.

on acceptance as payment, 1552.

statute of limitations, 1593.

under New York Code, not sufficient to aver that payee indorsed note in blank, "and that there is now due to the plaintiff on the note" so much, without other statement of his interest, 1649 n.

necessary averments in suit against indorser on a judgment against the maker, 1661.

an averment that note was "assigned in writing" is not equivalent to averment that it was duly indorsed, 1662.

lost note or bill, how pleaded, 1700.

damages need not be specially demanded in the declaration, 1722 n.

in Kentucky, the consideration for an assignment must always be averred, 1726 n.

alteration, how pleaded, 1783.

the statute against gambling contracts need not be specially, 1787.

illegality by reason of intended aid to the enemy in war must be particularly pleaded, 1788.

the statute of another state invalidating a note delivered on Sunday must be specially pleaded, 1790.

usury, how pleaded, 1798.

satisfaction of bill by delivery of goods must be specially averred, 1827.

"PLEASE,"

immaterial in a bill, 87.

PLEDGE,

recital of pledge does not affect negotiability, 201.

an agent authorized to discount principal's paper cannot pledge it for his debt, 361.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PRECATORY WORDS,
effect of, 87.

"PRESENTED,"

written on face of bill sufficient acceptance, 600.

PRESENTMENT FOR ACCEPTANCE,

presentment defined, 571 n., 1083.
when necessary, 16, 568.
foreign law, 582.
not necessary for postdated draft, 568.
or check, 8, 568.
deposit note payable "with interest on day of acceptance," 568.
waiver of presentment, 569.
circumstances dispensing with presentment, 570.
how made, 571.
of one of several parts, 240.
by whom, 572, 584, 1400.
to whom, 573, 584.
time for presentment, 574, 575, 583-587.
diligence, affected by circulation, 576.
should be more prompt, if several parts, 240.
affected by fluctuating exchange, 576, 577.
by other circumstances, 578.
American statutes, 579.
during business hours, 580.
at what place, 581.
see "Acceptance"; "Presentment for Payment."

PRESENTMENT FOR PAYMENT,

necessity when required:
necessity for, 17, 569 n., 581 n., 758, 760, 880, 914, 1067.
statutes requiring, 1075, 1076.
the manner of making, determined by law of place of payment, 1067.
so its necessity, 39, 52.
as against drawer, 1067.
averment of "due diligence" not sufficient, 1067.
so, where a debt is paid by a bill or note, 1067.
as against maker or acceptor, 1067.
if payable "at place certain," 1118.
though not damaged by the want of it, 1067.
as against surety, 914, 1072.
as against indorser, 832, 833.
for security merely, 1067.
or by way of payment of an existing debt, 1067.
signing also as co-maker, 914 n.
where paper is payable in installments, 1067.
as against indorser after maturity, 1068.
or before delivery, 847, 1068.
as against drawer on paper given as collateral merely, 1069.
acceptor on paper payable at or after sight, 1070.
supra protest, 1070, 1089.
on a note payable in merchandise, 1071.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PRESENTMENT FOR PAYMENT—Continued.

- after diligent inquiry, 1129.
- upon nonacceptance and notice of dishonor, 1198.
- American statutes, dispensing with, 1075, 1076.
- by whom made:
 - by any one in lawful possession, 1078, 1080, 1081.
 - or his lawful agent, 1078, 1081, 1460.
 - and such authority may be given by parol, 1078.
 - by the government, 1078.
 - or its authorized officer, 1078.
 - by agent in possession, without principal's indorsement, 1079.
 - indorsement, when necessary, 1079.
 - by personal representative, 1080.
 - by bankrupt or his assignee, 1080.
 - by husband, 1080.
 - by surviving partner, 1080.
 - by pledgee, 1080.
 - by pledgor, if in possession, 1080.
 - by notary, 1078, 1081.
 - by notary's clerk or partner, 1081.
 - by wrongful holder, inures to benefit of owner, 572.
- to whom made:
 - to acceptor, 1082.
 - to drawee and acceptor for honor, 1082.
 - to drawee au besoin, by statute, 1082.
 - to agent, 1083, 1084, 1086.
 - to bank clerk, 1083, 1092.
 - to president of corporation, 1082 n.
 - to cashier, 1083.
 - to attorney in fact, 1083 n.
 - to bookkeeper, 1083.
 - to servant, 1083, 1092.
 - to porter of a bank, 1083.
 - to treasurer of a church, 1083.
 - to former agent of insolvent company, 1083.
 - to any one on the premises in absence of acceptor or maker, 1084.
 - to maker, 1087.
 - to person representing himself to be maker, 1084.
 - at place named in bill, 1084, 1085.
 - at acceptor's residence, 1084.
 - to personal representative, 1085.
 - though himself an indorser, 1085.
 - maker's estate insolvent, 1085.
 - at residence of deceased acceptor or maker, 1085.
 - to widow of maker at residence, 1085.
 - to guardian, 1086.
 - to husband, 1086.
 - to bankrupt or assignee, 1086.
 - to partner, 1086.
 - to surviving partner, 1086.

[Reference is to sections, Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1901.]

PRESENTMENT FOR PAYMENT—Continued.

may be after maturity, 1087.
 as to drawer and indorser, 1088.
 presumption of damages from laches, 1073, 1106.
 on day of maturity, i. e. on last day of grace, 1061, 1088.
 of a sight bill, on third day after sight, 1088.
 bill payable one day after grace, 1088.
 at maturity, as against acceptor *supra* protest, 1089.
 bill payable thirty days after sight, protested and accepted eight days afterwards for honor of drawer, 1089.
 according to condition of acceptance, 1089.
 to several joint makers in different places, 1089.
 on holidays, 580, 1033.
 before maturity, 1090.
 when third day of grace falls on a legal holiday, 1090.
 when note falls due on Saturday, laches in presentment, 1091.
 excused by want of mail communication, 1091.
 second presentment after correction of irregularity in indorsement, 1091.
 paper payable in installments, 1091.
 hours for payment, 1061, 1092.
 at any time in business hours, 580, 1092, 1123.
 within banking hours, 1092.
 after banking hours, if any one there to answer, 1092, 1093.
 banking hours, 1061, 1093.
 judicial notice of banking hours, 1093.
 business hours, 580, 1094.
 ordinary hour for retiring, 580, 1094.
 a question for the jury, 1093, 1095.
 instances of what are such hours, 1094.
 evidence by certificate and allunde, 1178.
 reasonable hour, 1095.
 presumed, if not stated in notary's certificate or pleading, 1095.
 on day after making, if payable on demand, 1096.
 check or certificate of deposit, 1096.
 sight draft or bill, 1096.
 peculiar difficulty in making demand, 1096.
 bill intended for circulation, 1096.
 or as continuing security, 1097.
 bill payable on demand and drawee residing in another place, 1096.
 agreement not to present until after a certain time, 1097.
 demand note drawing interest, 1097.
 indorsement after maturity, 1098.
 of a nonnegotiable note, 1098.
 within sixty days by statute in Massachusetts, 1102.
 of bank notes, 1107.
 American and foreign statutes, 1108, 1109.
 reasonable time:
 if payable on demand or at sight, 1096.
 is a question of circumstances, 1097, 1099.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1332-1904.]

PRESENTMENT FOR PAYMENT—Continued.

general epidemic, 1326.
violent storm, great calamity, sudden accident, etc., 1326.
sickness or death of holder, 1327.
maker or acceptor, 1328.
insolvency or bankruptcy of drawee, 1329.
of drawer or guarantor, 1329.
of maker, 1331, 1332.
loss or destruction of bill, 1333.
if payable at or after sight, 1333.
maker or acceptor absconding, 1334.
after due diligence in making inquiry, 1334, 1335.
leaving country and going abroad at maturity, 1335.
mere absence from the state, 1335.
removal from the state, 1335.
removal within the state, 1336.
place of business closed during business hours, 1336, 1337.
or abandoned, 1337.
residence unknown and not ascertainable by reasonable diligence, 1338.
foreign residence, 1339.
paper void or otherwise illegal, 1340.
incapacity of maker or drawer, 1340.
illegibility of signature, 1340.
name of maker or drawee fictitious, 172, 1340.
and known by the indorser to be so, 1340.
joint interest or identity of parties, 1341.
taking collateral, 1342.
unless sufficient to constitute full indemnity, 1343.
part payment, 1343.
special deposit to meet bill, 1344.
taking general assignment of all maker's property, 1345.
bill drawn without funds, 1346, 1348-1350.
so of a check drawn on bank without funds, 1347.
as affecting indorser, 1346, 1355.
reasonable expectation of payment, 1350-1353.
as a mixed question of law and fact, 1350.
accommodation paper, 1354.

Waiver:

before maturity, 1356.
after maturity, 1356.
at time of making, 1356.
after judgment, 1356.
after discharge, on new consideration, 1356.
may be express or implied, 1357, 1388.
implied by what words, 1358.
written on bill or on separate paper, 1357.
as memorandum on bill, 218 n.
verbal, 1359.
is not within statute of frauds, 1359.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PRESENTMENT FOR PAYMENT—Continued.

- withdrawing the funds, 1385.
- by taking collateral, 1386.
- by attempting to collect, 1387.
- by anticipating dishonor, 1388.
- by request that it be charged to a separate account, 1388.
- by extension of time, 1390.
- by renewal, 1391.
- see "Notice of Dishonor."

PRESIDENT,

- added to signature, effect of, 133.
- of a corporation, powers of, 368, 369.
- see "Agent."

PRESUMPTIONS,

- as to law of place contemplated, 21.
- not necessarily known, 51.
- of place from date, 24, 1112.
- of business rather than residence, 25.
- of usury by lex fori inadmissible, 41.
- place of payment from date, 81, 124, 26, 1112.
- address or residence of acceptor, 46.
- foreign law, 27.
- from date, as to usury, 44.
- as to seal, 73.
- date, 77, 78.
- local date, 81.
- date prima facie residence of maker, 81.
- of indorser and drawer, 1280.
- negotiable, from "order" or "bearer," 91 n.
- "dollars" United States currency, 102 n.
- Confederate currency, 1399, 1736.
- indorsement made before maturity, 82, 686.
- at time of note, 686, 829, 1624.
- matures on demand if no time expressed, 119.
- accommodation, if payable at residence of drawer, 122, 1202.
- payable at bank in state, if necessary to negotiability, 128.
- execution by public officer, 132.
- of assets, from note by executor, 134, 439.
- maker and payee, same name, different person, 154.
- as to liability of agent executing, 144 n.
- from adding "security" to signature, 149 n.
- joint note or joint debt equivalent to joint and several note, 149.
- note to individual payee prima facie individual, not partnership, property, 155.
- as to consideration, if to bearer, 159.
- holder for value rebutted by evidence of stolen note, 159.
- possession by bearer prima facie title, 160, 391.
- consideration of commercial paper, 178, 562.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PRESUMPTIONS—Continued.

possession of drawer with blank indorsement, that bill has been put into circulation, 707.
as to erasure of an indorsement, 716, 1644, 1645.
joint payees to be joint indorsers, 741.
consent of indorsers, joining in a general release to maker by his creditors, to one another's action, 770.
from possession, 776.
from indorsement and possession, 777.
not, to know facts which do not form part of public record, 1016.
of title, 792, 1632, 1648.
irregular indorser, that he is a joint maker, 833.
above payee, that it was made to obtain credit with payee, 833.
presumptively a guaranty, 838.
may be rebutted by parol evidence, 838, 841.
no presumption of illegality because note was given for liquor, 532.
or for "futures," 566 n.
possession presumes right to demand acceptance or payment, 572.
by drawee before dishonor raises no presumption of obligation to accept.
589.
acceptance without date, before maturity and within reasonable time
after date of bill, 83, 596, 598.
acceptance made when dated, 598.
delivery at date, 77, 224.
before maturity, if no date, 224.
on Sunday, if no date, 225.
foreign Sunday law, 1790.
every bill an inland bill, 235.
foreign date a foreign bill, 235.
as to alien enemy, 249.
bank intended by "cashier," 157.
sanity, 259.
fraud from drunkenness, 261.
drunkard's contract for necessities, 263 n.
infant's note for necessities prima facie evidence of their value, 270.
validity of bills and notes executed by corporations, 335.
by foreign corporation, 335.
of municipal bonds, 339.
authority of agent of corporation, 393, 362-373.
from partnership name, 130.
to have been given in partnership business, 398.
as to bill drawn in firm name payable to, and discounted by one partner,
398.
partnership consent, 399, 409, 417.
partner's authority, 423.
as to partner's individual name, 130 et seq.
of firm debt from form of note, 407.
signature in blank no presumption of accommodation, 416.
"surety" added to signature is, accommodation paper, 416.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PRESUMPTIONS—Continued.

sufficiency of contents from proof of sending notice of dishonor, 1218.
notice of dishonor properly addressed, if deposited in post office "for" indorser, 1220.
presentment made in banking hours, if shown by notice of dishonor to have been at bank, 1226.
due presentment, from statement that it was "protested," 1227.
as to protest, 1229.
that it was not premature, 1140 n.
agent's authority to give notice of dishonor, 1236 n., 1237.
that notice of dishonor was left with proper person, 1249.
that notice of dishonor was given in due time, 1250.
at a proper hour, 1264.
notice of dishonor by mail, to be in time, 1266.
and received in the regular mail, 1269.
that post office addressed is residence of indorser, 1272.
notice received, 1299 n., 1302.
hour of receiving, 1275.
post office addressed, the nearest, 1312.
usual post office, the nearest, 1294.
personal service, 1296.
sent as stated in notarial certificate, 1313.
contents, as stated in notarial certificate, 1314.
admitted by promise to pay, 1316, 1317.
implied from indorser's conduct, 1318.
of waiver of notice, 1367.
implied from promise of payment, 1378.
request for time, 1378.
part payment, 1381.
relation of parties, 1389.
appointment of debtor as executor, 1397.
knowledge of laches at time of promise, 1379.
residence of maker not changed, 1126.
so, of indorser, 1281.
knowledge by indorsee of his indorser's residence, 1287, 1288.
knowledge of change, 1282.
diligence in ascertaining, 1285.
indorser's residence at place of payment, 1306 n.
funds in drawee's hands, 633, 634, 1346.
though drawer waived notice, 1346.
paid by mistake, 1483.
reasonable expectation of payment, 1346, 1348, 1352.
knowledge of law, 1378.
damage caused by laches, 1562.
payment, 1474, 1480-1482, 1550.
by bank notes received, 1402.
bill not surrendered, 1415.
possession by maker, 1425, 1475.
authority to receive, from possession, 1450.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PROMISSORY NOTES,

defined, 7.
formal requisites, 7.
may be in form of a bond or bill of exchange, 86.
a mere acknowledgment of indebtedness or duebill, 88, 90.
receivers' certificates are not, 90.
American statutes, 88.
certificate of deposit, 89.
receipt is, 89.
bill drawn upon one's self, 588.
on joint-stock bank by manager of branch bank, 588.
by president of corporation upon its treasurer, 588.
acceptance by a stranger, 591.
as payment, 749.
see "Payment."

PROTEST,

defined, 6, 1137.
form, 6.
distinguished from "noting" 1137.
what local law regulates, 32, 39, 52.
necessary for foreign bills, 18, 234, 1137, 1142-1146.
not against acceptor or maker, 1146.
or surety, 914, 1146.
or indorser before delivery, 1146.
extended to inland bills and notes, 758, 1137, 1143, 1144.
not corporation bonds, 12.
nor bank notes, 1143.
nor checks, 1144.
nor nonnegotiable drafts, 1144 n.
on copy, 241.
on any part, 241.
object to furnish proof of demand and dishonor, 1142, 1146.
for better security, 1147, 1154.
to fix drawer's liability for statutory damages, 1724.
holder not liable for making unnecessary protest, 1724.
may be made, though waived, 1356.
when made, 1036, 1037, 1140, 1159.
not before maturity, for nonpayment, 1140.
against drawer, after acceptance for honor, 568, 595, 1187.
qualified acceptance, 621, 626.
on day of dishonor, 1140, 1159.
long afterwards, 1140.
in business hours, 1140.
on Sunday or holiday, 1140.
before payment for honor, 1140, 1194.
where made, 1141, 1156, 1166.
by notary, 1139, 1155.
should be competent as witness, 1139 n.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

PUBLIC OFFICERS—Continued.

delivery to, without authority, not to the corporation, 223.
accepting a bill drawn upon deceased predecessor, 594.
see "Action"; "Agents"; "Governments."

R

RATIFICATION,

by infant, 273-276.
by principal, 374-376.
by partner, 397-400.
by confession of judgment, 410.
after dissolution, 429.
of forgery, 629, 1775.
of alteration, 1774.
of Sunday contract, 1790.
of municipal contract, by legislature, 347.

REASONABLE EXPECTATION, 1349-1353.

mixed question of law and fact, 1350.
see "Notice of Dishonor."

"REASONABLE TIME,"

for presenting a bill, 574, 575, 1096 et seq.
affected by circulation, 576.
the known usage of the place of business, 576.
fluctuating exchange, 577.
other circumstances, 578.
twenty-four hours is a, within which to accept a bill, 595.
promise to accept an undrawn bill must be acted upon within a, 614.
twenty-four days not a, for demand on note transferred after maturity, 672.
for acceptance of guaranty, 853.
question for the jury, 854.
what is, to make a demand to hold guarantor, 882.
question for the jury, 882.
reasonable time for notice of dishonor, 1251-1256.
to give notice of maker's default to guarantor, 887, 1210.
what is a, to prosecute maker to hold guarantor, 891.
question for a jury, 891.
surety may require holder to sue principal within a, 937, 938.
three years is not in such case a, 937.
a demand note or bill matures within a, 1041.
what is, 1042, 1043.
depends upon circumstances, local usage, etc., 1042, 1095.
is a mixed question of law and fact, 1041, 1049.
for circulation of note under English bills of exchange act, 1044.
see "Maturity"; "Notice of Dishonor"; "Presentment."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

RELEASE—Continued.

discharge of a guarantor by, 895.
surety by, 946.
indorser, 769.
effect of releasing principal, 947.
covenant not to sue equivalent to a, 948.
and as such discharges surety, 948.
reserving rights, 949.
of collaterals by holder discharges a surety, 951.
to have such effect must be a valid security and have some value, 951.
see "Indorser."
insolvency discharge, 770.
by composition in bankruptcy, 1834.
action may be barred by a formal, 1835.
bill cannot be countermanded in hands of a bona fide holder, 1835.
requires valid consideration, 1835.
part payment not a sufficient consideration, 1835.
conditional, 1835.
form of, 1836.
what is sufficient, 1836.
express consent necessary to release an acceptor, 1836.
in Tennessee, must be in writing, 1836.
implied, 1837.
question for the jury, 1837.
receiving collateral from maker, 1838.
agreement not to sue, 1839.
novation, 1840.
surrender of instrument, 1841.
cancellation or destruction of bill by holder, 1841.
otherwise, if invalid for mistake or fraud, 1841, 1846 n.
of execution, 1842.
includes what, 1843.
by whom given, 1844, 1845.
to prior party, 1846.
undisclosed accommodation or surety, 475, 1846.
to joint debtor, 1848.
to infant maker after repudiation, 1848 n.
death of joint maker does not release his estate, 1837.
as a defense against a bona fide holder, 1895.
parol evidence admissible to show, 1900.

REMEDY,

governed by lex fori, 53.

REMOVAL,

from state as excuse for not making demand or giving notice, 1335.
within state as such excuse, 1336.

RENEWAL,

by married woman, of original note before coverture, 285.
indorsed on note during coverture as surety for husband, 290, 293.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1291; vol. 3, §§ 1292-1904.]

RENEWAL—Continued.

condition in original does not affect, 94.
 supported by original consideration, 460.
 after dissolution of partnership, 432, 1540.
 an accommodation indorsement, 434 n.
 by surviving partner, 1542.
 power to make and indorse notes does not include a power of, 361.
 not a payment, 1511, 1538, 1571.
 erasure of, on a bill, 997.
 purchaser's good faith will be extended to a, of original note, 1005.
 effect on collateral, 1511, 1571.
 on original defense, 1583-1585.
 usury in renewal, 523.
 as waiver of alteration, 1775.

"RENEWED,"

memoranda on note extending time, 192.
 extension may be inferred from, 957.

REPLEVIN,

not for note obtained by duress, 1680.

REPRESENTATIONS,

estoppel by, 1868.
 subsequent, 1869.
 by other party, 1869.

RESCISSION,

for fraud, 1810.

RESIDENCE,

unknown, as an excuse for laches in demand and notice, 1338.
 foreign, as same, 1339.

RESTRICTIVE INDORSEMENT,

see "Collection"; "Indorsement."

RETURN WITHOUT PROTEST, or RETOUR SANS. PROTET,

does not affect negotiability, 201.
 constitutes a waiver of demand and notice, 1357.

RIOT,

sufficient excuse for not making demand, etc., 1325.

S**SALE,**

what is a, 749, 1544, 1548.
 by pledgee, 801.
 pledge of paper is not, in general, a power to sell, 801.
 notice of sale must be given to pledgor, 802.
 pledgor may sell his equity of redemption, 803.
 by sheriff at public auction, 826.
 see "Collateral Security."
 RAND.C.P.—190

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

SATISFACTION, 1823-1827.

- between whom, 1823.
- what is sufficient, 1823.
- by payment, 1824.
- by bill or note, 1825.
- by certificate of deposit, 1825.
- by other security, 1826.
- by services or merchandise, 1827.
- by delivery of goods, specially averred to have been so received, 1827.
- effect on collateral, 1826.
- effect of subsequent bankruptcy and avoidance, 1827.
 - see "Payment."

SAVINGS BANKS,

- see "Banks."

"SCALING ACTS,"

- Confederate, 1735-1738.

SCHOOL TRUSTEES,

- are public officials and not individually liable, 144 n.

SCROLL,

- equivalent to a seal, 72.
- not a notarial seal, 1138.
- presumption from, 73.

SEAL,

- not a sufficient signature, 64.
- how far destroys negotiability, 70, 71, 74.
- if not indorsed before maturity, 71.
- if reissued after payment, 74.
- addition is a material alteration, 70.
- by consent extends statute of limitations, 70.
- American statutes, 70, 71, 72.
- foreign statutes, 71.
- what is, 72.
- scroll, 72, 1138.
- stamp, 72.
- printed device without proof of intention, 72.
- effect of recitals, 72.
- evidence, 73.
- omission by mistake may be shown, 73.
- may be rejected as surplusage, 73.
- corporation seal equivalent to signing, 74.
- disregarded, if not recited, 73.
- adding to blank indorsement on note, 182.
- verbal authority to agent not sufficient for sealed note, 353.
- corporation may contract without, 74, 327.
- may make a bill or note under its corporate, 327.
- so may a municipal corporation, 336.
- not necessary for the indorsement of a corporation, 702.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

SET-OFF—Continued.

money demands only can be, 1849.
not unliquidated damages, 1849.
may be in equity, 1849.
breach of warranty, 1850.
fraud, 1850.
bill or note as set-off, 1851.
certificate of deposit, 1851.
is subject to the statute of limitations, 1592, 1851.
a guaranty cannot be, at common law, 894, 1852.
contingent liability of surety cannot be, 923, 981, 1852.
or of indorser, 1852.
right of contribution as a set-off, 977, 1852.
or of exoneration, 1852.
bank note, 1404, 1853.
against note assigned for benefit of creditors, 1853.
in an action brought by a receiver, 1853.
bank deposits, 1854.
after insolvency of bank, 1854.
must have been held before suit was begun, 1855.
after-acquired debts, 1855.
against bankrupts, 1833, 1856.
against pledgee of insolvent, 1882 n.
of debt not matured, 1857.
against other party, 1858.
when it inures to other party, 1858.
to surety, 1858.
payment of usury as set-off against purchaser for an existing debt, 1895 n.
penalty for usury by national bank, 528 n., 1795 n.
against agent, 1859.
against trustees, 1860.
against administrator, 1861.
by a joint debtor, 1862, 1863.
against a joint creditor, 1863.
by and against partners, 1855, 1863.
between partners, 1864.
by and against husband and wife, 320, 323, 1864.
against a state, 1864.
how affected by collateral security, 1865.
damages for conversion of collateral, 1865.
is not barred by a verdict, 1865.
or by a judgment and execution, 1865.
by drawer inures to acceptor, 1428.
is not payment, 1394.
note purchased from payee and held by maker's firm as set-off against payee, 1438.
judgment on a note set off in action for a deposit, 1393, 1441.
by bank as collecting subagent against a note made by an agent, 1457.
when excluded by reason of check being a conditional payment, 1559.

[Reference is to sections, Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

SOLDIERS,

incapacity by foreign laws, 246.

SOLE TRADER,

see "Married Women."

SOLICITOR,

knowledge of, when not binding on his principal, 1004.

SPENDTHRIFT,

statutory disability, 260.

STAMPS,

fresh stamp necessary in England after instrument corrected, 177, 1773.

bills void for want of, governed by the *lex loci contractus*, 36, 55.

sufficient signature, 64.

limits filling of blank in England, 187.

English and American statutes, 209, 210.

when necessary, 210, 1138.

prima facie affixed at delivery, 211.

on lost note, 211, 1703.

omission without fraud, 211, 214.

subsequently affixed, 211.

cancellation of, 212.

fraudulent omission, 212, 214.

United States statutes avoiding a bill without, unconstitutional, 213.

forgery of bill or note though not stamped, 213.

necessary to its admissibility in evidence, 214.

pleadings, 214.

omission, recovery on original consideration, 215.

addition of, is not a material alteration, 1762.

is valid in hands of bona fide holder, 1762.

STATE,

may be payee, 150.

a set-off is not available against a, 1864.

see "Governments"; "Municipal Corporations."

STATUTE OF FRAUDS,

as to express consideration, 446.

"value received" sufficient expression for guarantor to satisfy, 178.

when not applicable, 608, 648, 978, 1359.

applicable to guaranty, 871-874.

to indorsement by stranger, 843.

applies to a second acceptance by one not named in the bill, 594.

and the consideration for such acceptance must be expressed, 594.

a promise to accept a bill not yet drawn is within, in Missouri, 614.

consideration for surety must be expressed under, 863, 864.

English and American statutes, 870.

a promise by indorser after laches on demand is within the, 1380.

part payment by check will take a parol contract out of the, 1559.

English rule, consideration for guaranty under the, must be expressed, 875.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

STATUTE OF LIMITATIONS—Continued.

American and foreign statutes, 1595.
cases where statute does not apply, 1596.
runs against duebills from date, 1597.
certificates of deposit from demand, 1597.
interest coupons from maturity, 1597.
checks from demand, 1598.
against sealed notes, attested notes, 1598, 1599.
does not apply to bank bills, 1597.
limitation of collateral security, 1600.
does not run against the state, 1601.
decedents' estates, 1601.
disabilities excepted, 1602.
joint obligations, 1603.
when reckoned, 1604-1606.
on demand notes, from demand, 1607, 1608.
against drawer or indorser, from payment, 1608, 1609.
suspension by war, 1610.
by nonresidence, 1611, 1612.
by new promise, 1613.
express promise not necessary, 1613.
what is a sufficient promise, 1614, 1615.
verbal promise, 1616.
written promise, 1616.
conditional promise, 1616.
promise by agent, 1617.
executor, 1617.
principal, 1617.
surety, 1617.
joint maker, 1618.
to whom made, 1619.
how made, 1619.
how proved, 1620.
burden on one alleging it, 1620.
by payment, 1621.
on collateral, 1622.
payments must be voluntary, 1622.
manner of payment, 1623.
proof of payment, 1624.
indorsement by debtor, 1478, 1624.
holder, 1625.
part payment by joint maker, 1626, 1627.
payment by survivor, 1628.
executor, 1628.
indorser, 1629.
surety, 1629.
agent, 1629.
to whom made, 1630.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

SURETY,

liability regulated by *lex loci contractus*, 29, 38.
 not affected by principal's change of domicile, 38.
 discharged by alteration, 187, 1764.
 notwithstanding consent of principal, 1772.
 by addition or erasure of "surety," 896, 1745-1748.
 by altering date, 84.
 shown by parol evidence between co-makers, 149.
 adding to signature, 134, 419, 744, 897, 1015.
 bound by filling blank payee, 168.
 equity will relieve a, when delivered contrary to a known condition, 229.
 conditional delivery, defense at the suit of a bona fide holder, 230.
 liable though principal not, 283.
 married woman cannot become, 279, 289, 303.
 partner assuming to pay debts of dissolved firm is a surety, 427 n.
 defined, 978 n.
 who is, 474, 479, 753, 849, 863.
 indorsers liable as co-sureties by express agreement, 740.
 distinguished from indorser, 744, 767.
 guarantor, 849.
 see "Guaranty"; "Indorsement."
 form of contract, 896-907.
 adding "surety" to signature, 897.
 special averment of his liability, 896.
 presumed to be as shown by order in which names appear, 899.
 what character they have agreed to assume is a question of fact, 899.
 not enough to aver that payee knew drawer to be a surety for his co-drawer, 899.
 must be averred that bill was actually delivered and received with that understanding, 899.
 stranger signs a note, presumed to do so as, 914.
 acceptor prima facie principal, 900.
 drawer is, for acceptor, 942.
 accommodation drawer and acceptor are not co-sureties, 900, 1508.
 accommodation acceptor is principal as to holder, 901.
 so, accommodation drawer and indorser, 902.
 are co-sureties for acceptor, 902.
 accommodation indorsers, 903.
 blank indorsement by a stranger is a, 839, 903.
 no right of contribution, 903.
 between themselves they may prove an agreement to that effect, 903.
 joint makers, 904, 905.
 will not be presumed to be, 906.
 knowledge of their relation by the payee presumed, 906.
 accommodation maker, 907.
 parol evidence admissible *inter se*, 897, 908.
 against holder, 898.
 with notice, 910.
 against payee, 909.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

SURETY—Continued.

- discharge by release, 946-952.
- effect of releasing principal, 947.
- release of co-surety, 946.
- covenant not to sue equivalent to a release, 948.
- release, reserving rights against the, 949.
- releasing collateral security will discharge the, 951.
- discharge by misuse of collateral, 952.
- discharge by bankruptcy, 950.
- voluntary composition, 950.
- waiver of discharge, 953, 969.
- diligence not waived by waiver of protest, 953.
- when a question for the jury, 953.
- paying debt in ignorance of the discharge, cannot recover it back, 953.
 - see "Waiver."
- extension to principal:
 - discharges surety, 476, 954, 1817 n.
 - without prejudice as to collateral, 954.
 - extension to acceptor discharges surety, 954.
 - to maker discharges indorser, 954.
 - to partner discharges old partners, 954.
 - to principal maker discharges an accommodation joint maker, 954.
 - accommodation acceptor discharged by forbearance to principal, 788, 955.
 - insolvency of principal, effect on discharge of, 945.
 - discharging principal from *capias ad satisfaciendum*, 945.
 - discharging principal from a lien, 945.
 - consenting to return execution without a levy, 945.
 - extension to one joint debtor, 955.
 - valid agreement necessary for extension, 954, 956-959.
 - reserving rights against surety, 970.
 - surety indemnified, 970.
 - extension by taking new bill or note, 960.
 - afterwards avoided in bankruptcy, 930.
 - by taking collateral, 961, 962.
 - part payment, 963.
 - consideration necessary to extension, 964-967.
 - parties to the agreement for extension, 968.
 - contribution, 971-977, 1438, 1803.
 - right may be released, 973.
 - or barred, 924, 976.
 - or used as set-off, 977.
 - goes with transfer, 971.
 - and extends to collateral, 975.
 - action for contribution, 977, 897, 1647.
 - should be an action for money paid, 977.
 - such action cannot be brought until payment has been actually made.
977.
 - one action against all only in equity, 977 n.
 - see "Contribution."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

TENDER—Continued.

- a mere offer to pay is not sufficient, 944.
- what is not a refusal of a, 944.
- on holiday, 1033.
- of check in payment, 1398.
- legal tender act, 1401.
- of bank notes as cash, 1402.
- of creditor's own note, 1404, 1851.
- or its bank note, 1404, 1853.
- or certificate of deposit, 1825, 1826.
- note payable in merchandise a, necessary, 1407, 1408.
- of part payment no defense, 1409.
- what is a good, 1442.
- to a foreign administrator, on condition of indemnity being given, stops running of interest, 1448.
- made about sunset on day of maturity, 1471.
- made after maturity, before suit, no defense, 1472.
- good tender stops accruing of further interest, 1711, 1472.
- available only in bar of damages and costs, 1472.
- made by checks, 1556.
- of indemnity on lost bill, 1695.
- of silver on bill "payable in United States gold coin," 1736 n.

TIME,

- how reckoned by the lex mercatoria, 1029, 1036.
- by the common law, 1036.
- what days included, 1036.
- reckoning days of grace, 1061.
- time for presentment, when made, 1087 et seq.
- waiver of demand and notice by extension of time, 1390.
- running of the statute of limitations, how reckoned, 1606.
- on a demand note, 1607.
- see "Notice of Dishonor"; "Reasonable Time."

TIME OF PAYMENT,

- must be certain, 109, 110.
- foreign statutes, 109.
- American statutes, 109.
- "on demand," 109.
- "at sight," 109.
- "on or before certain day," 110.
- "on or after" certain day, 110.
- "or sooner after five years," 110.
- option to pay before maturity, 110.
- "by a certain day," 110.
- left blank, 110, 186.
- may be filled by bona fide holder, 110.
- omission of day, month, etc., 110, 186.
- memorandum naming different day, 110.
- "when able," "when in funds," 111.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

TRANSFER,

by indorsement, if to order, 13.
by delivery, if to bearer, 13, 159, 175.
by husband to wife, prima facie illegal by foreign law, 34.
governed by what law, 35, 48.
of sealed instruments, 70, 71, 651.
subject to equities, 70, 71.
assignor not liable to his assignee or subsequent holder, 70, 71.
nonnegotiable note subject to defenses, 128, 655.
by alternative payees, 155.
by public official as payee, 158.
after the expiration of his office, 158.
what are transferable, 650-655.
checks, bonds, warehouse receipts, municipal warrants, 651.
detached coupons, 159.
notes payable to "A. B., or bearer," 160, 175, 177, 654.
restrained by express words, 160 n., 175 n., 177 n.
by delivery, if payable to fictitious person, or bearer, 162.
by payee named but not intended, 165, 166.
 such indorsement is a forgery, 166.
carries face of negotiable paper, 173.
vests title in government though paper nonnegotiable, 174 n.
holder my sue, 175.
without recourse, consideration should be averred, 180.
blank indorsement sufficient, though wrongfully filled, 188.
by agreement for delivery in pledge subject to defenses, 219.
carries all parts of a bill, 239.
by bankrupt, 247.
incapacity set up by maker, 257 n.
by married woman, 288, 322.
by joint payees, 663, 734.
by joint owners, 663.
by payee named as such by mistake, 663.
by partners, 663.
by agents, 664, 666.
by executor or administrator, 441, 665.
by guardian, 158 n.
by assignee, 322, 665.
by sheriff under execution, 665, 826.
by fictitious payee, 666.
by pledgee, 801.
by pledgor, though then out of his possession, 803.
to whom, 667, 685.
to acceptor or drawer, 667.
postdated bills before their date, 668.
before or after acceptance, 669.
after maturity, 670-674.
and payment, 682, 683.
after maturity, accommodation paper, 670, 677.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

TRANSFER—Continued.

- of property of surety prevented by court of equity, 974.
- of bill or note in payment, 1523.
- pending suit, 1652.
- of fund by check, 1664.
- injunction against, 1687.
- usury in transfer, 1794.
- fraud in, 1807.

TREASURER,

- powers of a, 371.
- see "Agent."

TRESPASS,

- by principal for note taken from agent, 1656.

TROVER,

- action of, on accommodation paper, 473, 560.
- for wrongful possession or collection, 1679.
- by assignor of insolvent payee transferring without necessary indorsement, 793.
- against pledgee of bill to bearer pledged by agent who held it for sale, 794 n.
- for selling an oil receipt held as collateral before maturity of note, 801.
- a collecting agent retaining note by attachment is not liable in trover, 814.
- at common law, by owner, 1653.
- on discount refused by nominal payee, 1655.
- on violation of escrow, 229.
- effect of judgment on title, 801 n., 1679.
- for rehypothecation of collateral, 802.
- when it will lie, 1571, 1579, 1581, 1679, 1803, 1807, 1810.
- between what parties, 1579.
- against agent, 1680.
- wrongful taker, 1680.
- indorsee, 1681.
- for lost or stolen bills and notes, 1682.
- but not against bona fide holder of such paper, 1683.
- damages in, 1684, 1732.
- a note altered without fraud may be recovered in, 1763 n.
- will lie against one making an alteration, 1764.

TRUSTEE,

- delivery to, 223.
- added to signature, 133, 142, 444.
- notice of trust, 158, 1010.
- a note payable to and indorsed "A. B., trustee," is not negotiable, 158, 444.
- its transfer is subject to equitable defenses, 158, 444.
- does not affect negotiability, 174.
- note signed "C. D., by her trustee, A. B.," 443.
- as payee, 444.
- for wife may transfer without her, 444.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

USURY—Continued.

note given in exchange for another may be sold at a discount without, 449, 452, 479.
usury statutes in England, 521.
in United States, 521.
by national banks, 521, 526.
validated by ratification, 523.
usury renewal, 459, 523, 1585, 1794.
substitution of a new contract, 524, 1585.
usurious discount, 526.
at inception of accommodation paper, 526.
compound interest, 527.
taking interest in advance, 527.
reserving interest after maturity at usurious rate, 529 n.
mistake in reckoning the interest, 527, 1791.
for 360 days for a year, 527.
exchange may be included in the paper, 528.
as a device to cover usury it is illegal, 528, 529.
agreement to take uncurrent bills, 528.
attorney's fees included, 528.
agent's commissions, 530.
building loan fines and premiums, 528 n.
mortgage to agent for higher rate of commissions, 528.
commissions as surety, etc., 528.
payment of bill discounted by certificate of deposit maturing later, 529.
in other currency, 529.
interest after maturity, 529.
by agent, 530.
collateral security for a usurious loan, 530, 531, 1791, 1797 n.
no payment of a prior debt by usurious note or bill, 1528.
not controlled by any usage of trade or custom of merchants, 531.
defense confined to the immediate parties, 531.
apportioned, if joint debt apportioned, 531.
voluntary payments of, cannot be recovered, 531, 1795.
payments to bona fide holder recovered, 531.
consideration for transfer, 693.
for extension, 967.
not sufficient consideration for extension of note or bill, 530, 768.
but holder estopped from setting it up, 768.
in note guaranteed avoids guaranty also, 857.
as a defense, 387, 390, 1791.
by surety, 921, 944, 967.
against holder filling blank for payee, 185.
against bona fide holder, 525, 1890.
barred by estoppel, 1585.
paper void made in violation of, 1791.
by corporations, 1792.
national bank act, 526, 1792.
penalty not available as set-off, 1795 n.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

WAIVER—Continued.

- discharge of an acceptance by, 640.
- parol evidence to show a, of demand and notice of dishonor, 784.
- of notice of acceptance of a guaranty, 855.
- of discharge of guarantor for want of notice of maker's default, 885.
- of discharge by guarantor, 888, 895.
- of presentment for acceptance, 569.
- of acceptance, 1146.
 - see "Acceptance."
- of discharge, by surety, 918, 939, 953, 969.
- by words or acts, 953.
- does not require any new consideration, 953, 969.
- may be sued on the original liability, 953.
- of extension need not be in writing, 957.
- of statute requiring written notice to sue principal, 938.
- reserving rights against surety, 970.
- surety being indemnified, 970.
 - see "Surety."
- of demand and notice of dishonor, 420, 1077, 1356 et seq.
- by a lunatic or drunkard, 262 n.
- as admission of due presentment, 1077, 1365 n.
- confessing judgment is prima facie evidence of waiver of demand and notice, 1077.
- production of the paper may be waived when presented, 1131.
- protest waived or excused, 415, 1148, 1161.
- holder's right to protest not affected, 1356.
- fresh consideration not necessary, 445, 1148.
- of protest is not waiver of presentment for payment, 1161.
- nor of grace, 1365 n.
- of objection to notice of dishonor, 1234.
- or to premature demand, 1365 n.
- promise to pay may be a, of notice of dishonor, 1316.
- distinction between promise as waiver and as evidence of due notice, 1316 n.
- in collateral instrument dispenses with proof of notice, 1318.
- of right to have note paid in work, 1408 n.
- of liability of collecting agents, 1459.
- holder may waive fraud in procuring note and sue for money had, 1673.
- pleading to merits in action on lost bill waives affidavit of loss, 1700.
- of higher rate of interest, by receiving interest at the original rate, 1713.
- of damages, 1725.
- of execution against one will not discharge others, 1812.
- of an alteration of an instrument, 1774.
- what is not a waiver, 1384 n., 1776.
- verbal promise to pay, 1377 n.
- of defense of forgery, 1782.
- of failure of consideration, 538, 541.
- of a statutory prohibition of usury, 1795.
- of fraud, 1812.
 - see "Notice of Dishonor"; "Presentment for Payment."

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

WAR,

- beginning and ending of the civil war in the United States, 249.
- effect on contracts, 249 et seq.
- acceptance by partner after, 426 n.
 - see "Aliens and Alien Enemies."
- extends time for giving notice of dishonor, 1253.
- is a sufficient excuse for not making due demand and giving notice of dishonor, 1324.
- when was the beginning and ending of the, among the states, 1324.
- suspends the statute of limitations, 1610.
- pendency of, suspends the running of interest, 1705.

WAREHOUSEMAN'S RECEIPT,

- negotiable, 89.

WARRANTS,

- when negotiable, 91.
- municipal warrants, 337.
- not negotiable, 337.
- defenses admissible against, 389.

WARRANT TO CONFESS JUDGMENT

- how affects negotiability, 207.

WARRANTY,

- delivery without indorsement not, of solvency of prior parties, 748.
- delivery of a bank note is a, of the solvency of the bank at that time, 749.
- of solvency of maker or acceptor may be by parol, 749.
- of good faith on transfer of bills and notes, 751.
- of genuineness of bill or note by delivery, 753.
- of title on transfer, 755.
- of validity, 756.
- of constitutionality of state or municipal bonds on transfer, 756.
- of title in transfer "without recourse," 755.
- competency of prior parties, 757.
- validity of the instrument, 757, 758.
- its subsisting character as a debt not paid, 757.
- breach of warranty, as a set-off, 1850.

"WE, OR EITHER OF US,"

- equivalent to a joint and several note, 87.

"I PROMISE,"

- when equivalent to "I promise," 87.
- indicating liability of corporation, not agent, 143.

"WHEN ABLE,"

- time of payment conditional, 111.
- as affecting statute of limitations, 111.

"WITHOUT DEFALCATION OR DISCOUNT,"

- when necessary, 86.

[Reference is to sections. Vol. 1, §§ 1-567; vol. 2, §§ 568-1391; vol. 3, §§ 1392-1904.]

"WITHOUT RECOURSE,"

indorsing note or bill, 720.
proper form for an agent to adopt, 720.
similar expressions, 721.
effect on bona fides, 722.
does not affect negotiability, 722.
erasure of, is a material alteration, 722.
American statutes, 722.
indorsement, warrants title, 720, 755.
validity, 720, 757.
that prior signatures are genuine, 720.
parol evidence to show an indorsement to be, 779.
which indorser intended, 720, 779.
indorsement, as notice of defects, 1008.
indorsement by a stranger, 832.
transfer, warrants title, 755.

WITNESS,

added to signature, 87.
to note a material alteration, 1761.
competency determined by lex fori, 55.
attestation by, 68, 69.
see "Attestation by Witnesses."

WORDS,

required by statute, 86.

WORK,

note payable in, 1408.

WRITING,

necessary, 60.
necessary for an indorsement, 702.
statute of frauds, when applicable to a guaranty, requires it to be in writing, 879.
what is a sufficient, for a guaranty, 879.
blank indorsement with express authority to write a guaranty, 879.
notice by surety to holder to sue principal must be in, 937.
contract to indemnify surety need not be in, 978.
notice of dishonor should be in, 1219.
waiver of demand and notice of dishonor need not be in, 1359, 1388.
acknowledgment of debt must be in, 1616.









